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ACTION.

1. The demand set up by the defendants in this case is, in its nature, independent from the action brought by the plaintiffs, and should therefore be considered as a principal, and not a reconventional demand. *J. O. Murphy & Co. v. McCarthy & Finnerty*, 38.

2. Where a contract has for its consideration an illegal currency reprobated by law, the plaintiff suing on that contract can not recover. *Jacob Donnely v. L. L. Johnson*, 55.

3. The plaintiff being ostensibly the owner, under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner and as such entitled to both the property and its revenues, he must seek his remedy in a different direction.

B. K. Hunter v. M. J. Dunham et al.—T. H. J. Richardson, intervenor, 141.

4. A party can not, without showing an interest in the matter, be permitted to interfere with the final settlement of an estate between the heirs, and to pray that the public administrator of the parish be appointed to administer said estate and have an appraisalment thereof made.

If the partition entered into between the heirs, and of which the plaintiff complains, is irregular and illegal, it is not to be corrected by taking out an administration.

Succession of Esther Poret—Opposition to Application for Administration, 157.

5. The plaintiff has instituted this suit to recover the amount of certain notes which he gave for having purchased at the succession sale, of one Sompeyrac the undivided half of a tract of land. He alleges that these notes were paid in error, having recently discovered that the said succession had no title to the undivided half of the tract of land so sold and adjudicated to him, and hence that he paid what he did not owe and for something which he did not acquire.

The plaintiff's action is premature, as no eviction or disturbance has occurred; and if it be considered an action of rescission, which it is in effect, it is defective, because plaintiff has been in possession several years, has made no tender of the property, or offer to return the same to the defendant, nor made an allegation that he has been disquieted, or has a just reason to fear disturbance or evic-

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tion. The demand, as made, puts the plaintiff in the position of keeping the property and demanding the return of the price.

Louis Duplex v. Alexander Deblieux, Executor, 218.

6. Plaintiff, alleging to be the sheriff for the parish of Madison, in-joined defendant from acting or assuming to act as sheriff, from possessing or attempting to possess the books, papers, and archives of the said office, and from intruding or attempting to intrude himself therein. The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception is well taken and should have been maintained. The injunction must be dissolved.

Enos M. Cramer v. Alexander V. Brown, 272.

7. The possessory action is not the mode to test the right to enforce a mortgage or the regularity and validity of the proceedings in the execution of judgments. To recognize the action of plaintiff in this instance would give to every third possessor of mortgaged property the right to obtain and hold possession of such property against and in despite of the legal proceedings by the mortgage creditor to enforce his claim.

The law has provided the remedy for the protection of the rights of a third possessor, but it is not the possessory action.

T. A. Dahlgreen v. Stephen Duncan et als., 363.

8. The exception to the action must be sustained, where that action is a revocatory one and the petition itself discloses that there are, besides the defendants, other parties in interest who have not been made parties to the proceeding.

Abraham Vandine et als. v. Eherman & Lecanu et als., 388.

9. A claim for money expended and time employed for the organization and benefit of the Loan and Pledge Association, before its incorporation, can not be regarded and enforced as a debt of that institution.

It is impossible to imagine how the defendant, a juridical person, incurred a debt before its existence.

Besides, it is shown that \$1000 of plaintiff's claim was for cash advanced for the purpose of influencing legislation; that is, bribing the Legislature to pass the act incorporating the Loan and Pledge Association.

For the recovery of money thus expended, this court can give no relief. The guilty suitor must be left where his immorality has placed him.

A. Marchand v. The Loan and Pledge Association, 389.

ACTION—Continued.

10. In the order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property, there are two fatal defects:

First—The mortgageor is not made party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action.

Octave Reggio, Curator, v. Blanchin & Giraud, 532.

11. The defendants who are sued by certain heirs, as third possessors of an undivided half of the land described in the petition and sold by their father after the death of their mother, excepted to the right of the plaintiffs to recover until a settlement was made of the community that existed between the parents of the plaintiffs, showing a residuary interest in the succession of the deceased spouse. The exception is fatal, and the suit must be dismissed.

M. E. Daniel, Tutor, v. J. A. Ivy et als., 639.

12. There is no validity in the defense that, as the plaintiff who sues for the settlement of a commercial partnership, was not separated in property from her husband, the funds which she put in belonged to the community and she has no right of action.

Plaintiff has the right to sue for a settlement, if she was a partner, because this essential right exists in every partnership. Whether the capital which she put in belonged to her or not is a question that does not concern the defendant. Plaintiff's husband, having signed the contract of partnership, authorizing her to make it and having also authorized her to bring this suit, can never demand of the defendant the funds put in by his wife, whether they belonged to the community or not.

Mrs. T. J. Mangrum and husband v. Mrs. C. Norsworthy, Tutrix, 640.

SEE ATTACHMENT, No. 2—*Goodwell & Webb v. Minchew, 621.*

SEE BILLS AND PROMISSORY NOTES, No. 8—*Walton v. Young, 164.*

SEE CONTRACT, No. 10—*Field & Ponder v. Rogers et al., 574.*

SEE EVIDENCE, No. 30—*John Gordon v. Farenberg & Penn, 366.*

SEE INJUNCTION No. 19—*Mrs. Lewis v. Winston et als., 707.*

SEE JURISDICTION, No. 23—*Bowen v. Callaway, 619.*

SEE SUBROGATION, No. 1—*C. J. O'Hara v. N. Schwab et al., 78.*

SEE SEIZURES AND SALES, No. 8—*Johnson v. Dunbar, 188.*

SEE SUCCESSION, No. 2—*Netter v. Herman & Levy, 458.*

ADMINISTRATOR.

1. A party can not, without showing an interest in the matter, be permitted to interfere with the final settlement of an estate between the heirs, and to pray that the public administrator of the parish be appointed to administer said estate and have an appraisal thereof made.

ADMINISTRATOR—Continued.

If the partition entered into between the heirs, and of which the plaintiff complains, is irregular and illegal, it is not to be corrected by taking out an administration.

Succession of Esther Poret—Opposition to application for administration, 157.

2. The interference of the public administrator in this instance, on whose application defendant was removed from her trust as executrix, and himself appointed dative testamentary executor, was officious, and the judgment is erroneous. This is not a vacant succession; neither had the person appointed executrix failed to qualify, nor had she been removed, nor had any of the creditors asked for her removal.

Succession of W. O. Winn—O. K. Hawley, Public Administrator, v. M. E. Richards, Executrix, 162.

3. Margaret Moran, the surviving wife and natural tutrix of the child of the deceased, opposes a creditor's application for the administration, and claims it in her own right and as tutrix of her child. In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Therefore, the fact of deceased having married while a slave in Mississippi, did not prevent, notwithstanding the former wife still continued to exist, his lawfully marrying Margaret Morgan in Louisiana, where he resided after his emancipation. Besides, it is not in evidence that Margaret Morgan knew of his having another wife when he married her. *Succession of Henderson Randall, 163.*

4. A power of attorney given by the administratrix of an estate, to administer her own affairs can not be construed to extend to the administration of the estate of her deceased husband. The power of attorney granted to a person to manage the affairs of a succession, must be express.

The account not having been filed by the administratrix, nor by any one authorized by her, nothing therein contained can be considered as binding upon her or upon the estate which she represents.

The claim of the plaintiff, if not kept alive by the judgment rendered on the tableau, is long ago prescribed.

Succession of James W. Pipes, 203.

5. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section 9 of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

ADMINISTRATOR—Continued.

6. Where the plaintiff, individually and as administrator of a succession, sues to annul the sale of the succession property and other proceedings held in connection with the settlement of that succession, on the grounds that his attorney exceeded his authority therein; that the sale was null, no price being paid; and that all said mortuary proceedings were had without his knowledge or authorization, and were in fraud of his rights; and where said plaintiff instituted this suit more than six years after the sale which he seeks to annul:

Held—That under the circumstances presented in the record, this court can not think there should be much hesitancy in rejecting plaintiff's demand.

Wm. L. Cushing et als. v. S. L. Harmonson et als., 214.

7. Whatever may be the ordinary relations between the administrator of a succession and his attorney conducting the necessary judicial proceedings in the settlement of a succession according to the laws of this State, an administrator, residing in a parish distant from that where the succession is opened, who showed so little interest in, and attention to, his fiduciary trust, who allowed such a length of time to elapse before taking a single step of a personal nature, and who committed the whole succession to the sole management of his attorney, should not be heard with much favor when he asks a court of justice to undo what it has done at the request of his attorney. *Ibid.*
8. It was the duty of the administrator, as an officer of the court to know what proceedings were being had in the succession administered by him and to present himself, or have another attorney to represent him, in the place of the one who had died. To grant his demand would be a premium upon negligence in fiduciary agents and officers of courts. *Ibid.*
9. The prescription of one year to this action of nullity is properly invoked. The argument of the administrator that prescription only began to run when he discovered the alleged fraud practiced upon him, can not be of any avail, as he was bound in law to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care. *Ibid.*
10. By the judgment homologating the final account and tableau of her administration, the administratrix, plaintiff in this case, was discharged from her trust. Therefore, if that judgment be not utterly null, she, as administratrix, has no standing in court.

The evidence in the record shows that the attorneys who filed the account were employed by her and that they were authorized to act in the premises.

ADMINISTRATOR—Continued.

Besides, more than twelve months had elapsed from the rendition of the judgment homologating the account, when this suit in nullity was instituted.

The administratrix can not be listened to when urging her own laches in having the account homologated before the account and tableau had been advertised ten days, in order to gain an advantage individually.

Succession of Antoine Decuir—Mrs. Josephine Decuir, Administratrix v. Leon Ferrier et als., 222.

11. The administrator of a succession only represents the creditors, and after the settlement of the debts, must turn over the estate to the heirs; but can not create or recognize any debt which will pass with the estate, and remain a binding, continuing debt against the heirs, because he is not appointed to represent them.

The provisions of the law seem to give to an illegitimate child the right of action for alimony only against the parent or his heirs. It is not a debt against the succession, which the creditors must allow, or which they have an interest in resisting, but a personal debt of the parent and of those who inherit his estate, and the heirs only take the residuum after the payment of the debts of the succession.

Therefore, the action for alimony, on the part of an illegitimate child can not properly be brought against the administrator of a succession. It seems by law to be owing by the heirs according to their virile share, and the obligation to pay it continues while it is necessary, or they are able to pay.

Louise Drouet v. Succession of L. F. Drouet, 323.

12. As the law has prescribed no specific form in which the appointments of administrators are to be made, if the certificate of appointment is signed by the judge, although it may not be in the usual form and manner in which such appointments are made, and letters issued, yet it must be considered as the act of the judge and effect must be given to it.

In this case the instrument declares that the application was made, that the party applying was duly appointed administrator and has fulfilled all the requirements of the law. This is to all intents and purposes the evidence of an appointment by the judge who signed the document.

Succession of Etienne Carlon, 329.

13. It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

Widow Anatole Villere v. Succession of Hugues Villere, 380.

14. It is clearly shown in this case that there has been a great dis-

ADMINISTRATOR—Continued.

crepancy between the amounts of revenues and expenditures in the administration of the minor's estate. The excess of the expenditures should fall upon the defendant. As he assumed the functions and discharged the duties belonging of right only to a tutor, and had exclusive control of the person of the minor, of his property and its revenues, so he must be held to the responsibilities of a tutor.

The court below erred in not overruling the exception to its jurisdiction in regard to annulling the mortgage granted by plaintiff to defendant. The defendant filed an account as administrator. That instrument has also the character of a tutorship account. The account shows a considerable balance against the minor, the present plaintiff, who, at the instance of the defendant, executed a mortgage on her property to secure the payment of that balance. The administrator's account was homologated by order of the judge *a quo*. The mortgage has for its basis the account so homologated. That the judge *a quo* has jurisdiction of the suit to annul the amount and the order homologating it, there can be no doubt. The annulment of the account and judgment of homologation carries with it necessarily the annulment of the mortgage, because it expunges the amount of the assumed indebtedness for which the mortgage was given, thereby sweeping away the basis upon which it rested. *Emma J. Thacker v. Thomas Dunn*, 442.

15. The tutor states that he obtained the individual consent of persons who had composed a family meeting on a previous occasion, to make use of the capital of the minor's estate as he did. This is not justifiable, and, according to our law and jurisprudence, can not be allowed in favor of a tutor and surety.

Mrs. E. A. Deblanc v. F. Levasseur et al., 541.

16. The delinquent executor, who abandoned his trust and appropriated the funds confided to him, stands without equity before the court. He is in no position to complain of the penalties prescribed by law for not depositing the funds in bank.

Succession of Edmund Hogan. On opposition of Jeremiah Hogan to account filed by Peter Gallagher, Executor, 567.

17. Among the several grounds of opposition to a public administrator's account it was urged, that said public administrator had not been legally appointed. To this the administrator excepted on the ground that it was an attempt to remove him from office, which he maintained, could only be done by direct action. The judge *a quo* erred in dismissing the opposition. Admitting that in such a proceeding as was before the court, the administrator's capacity could not be questioned, still his exception should only

ADMINISTRATOR—Continued.

have been maintained in so far as it related to the denial of his capacity. The merits of the opposition on other points remained intact, and the opponent had a right to have them passed upon.

Succession of R. P. Epperson, 595.

18. The objection to the jurisdiction of the district court over the demand of the plaintiff can not be maintained, but, as the administrator of the estate of the deceased represents only the creditors of the succession, and has power only to pay the debts and turn the *residuum* over to the heirs, he can not represent the latter in a controversy to settle the rights of the respective partners in community, nor in a partition of the community property. A judgment against the administrator in this case would not bind the heirs of the deceased. The judge *a quo* did not err in dismissing the suit against the administrator.

Valcourt Veazy v. Onesime Trahan, Jr., Administrator, 606.

19. The plaintiffs, as heirs of the deceased wife of the defendant, alleging that he failed to open her succession, or cause an inventory thereof, consisting of half of the community property, to be made, but has administered the same as *negotiorum gestor* and permitted it to be wasted and dilapidated, obtained an *ex parte* order directing him to file an account of his administration and a notary public to make an inventory of said succession.

There is no authority for calling on a *negotiorum gestor*, in this manner, to render an account to the court in a fiduciary capacity, as an administrator of a succession; nor is the surviving husband, holding under the law as usufructuary, to be called on thus for an account of an administration. *Angeline Rentz et als. v. Richard Cole*, 623.

20. As the administrator of an estate can not bind the estate he represents *ex contractu*, without the authority of the judge, the estate can not be bound by a breach thereof.

Hoss & Elder, Administrator v. George J. Jones, 659.

21. An administrator has no power to novate a debt due to the succession under his charge, without at least having been authorized to do so.

Ibid.

22. Under no circumstances can the administrator of an estate take in payment of the rent of property a draft payable at the end of the lease, and thus give up the privilege which the estate he represents has on the growing crop.

Ibid.

SEE COMPROMISE, No. 4—*Mahle et al. v. Elder et al.*, 681.

SEE SEIZURES AND SALES, No. 20—*Duckworth v. Payne et al.*, 683.

SEE HUSBAND AND WIFE, No. 2—*Anne Ford v. Kittridge*, 190.

SEE HUSBAND AND WIFE, 3, 4, 5, 6—*Hawley v. Crescent City Bank et als.*, 230.

SEE LEGATEES, No. 1—*Mrs. Evelyn M. May v. Ogden & Stansborough, Executors*, 239.

SEE APPEAL, No. 20—*State ex rel. Rasberry v. parish Judge of the parish of Bossier*, 385.

SEE INTERVENOR, No. 6—*Webb v. Keller*, 596.

ADMINISTRATOR (PUBLIC.)

1. The Public Administrator, in this instance, is only entitled to two and a half per cent. commissions on the collections he made. He was acting in the capacity of an ordinary administrator under appointment of the court. His pretensions to five per cent. commissions on the whole appraised value of the estate are extravagant. The preceding administrators, who were in office four years, and who had virtually closed the administration, were allowed two and a half per cent. on the amount of the inventory. For the brief space of his administration, during which there were but a few simple acts to be performed, his charge of five per cent. commissions on the whole value of the estate is totally unwarranted by law. In creating the office of public administrator, the Legislature can not have intended to sanction the spoliation of successions.

Succession of E. Hart—Opposition of Cornelia Hart, Tutrix, 662.

- 2 In this case the judgment of the court *a qua* appointing the public administrator to administer the succession was erroneous. It was not a vacant succession. There were no debts against the estate—the heirs were represented according to law and were claiming to be put in possession. Under this state of facts his functions were not required.

Succession of Mary A. Gee, 666.

ADJUDICATION.

SEE OBLIGATIONS, No. 9—*Batt & Michel v. City of New Orleans, 754.*

AGENT AND PRINCIPAL.

1. A power of attorney given by the administratrix of an estate, to administer her own affairs can not be construed to extend to the administration of the estate of her deceased husband. The power of attorney granted to a person to manage the affairs of a succession, must be express.
- Succession of Pipes, 203.*
2. The evidence in this case shows that the plantation which is the object of this suit was purchased in his name, for the benefit of plaintiff, by defendant, who was the agent and attorney at law of plaintiff's mother and tutrix, then absent from the State, and that he expected the plaintiff to have sufficient funds out of the succession of her grandfather to pay the note given by him for the price at the maturity thereof.

The question is: Having failed to collect for the minor funds sufficient to pay said note at maturity, was defendant justified in refusing to transfer the title to plaintiff, when she returned to the State, was emancipated by the court, and tendered to him the note which he had executed for the land, and \$500, the cash he had paid on that note, with interest on said payment?

AGENT AND PRINCIPAL—Continued.

Held—That, under such circumstances, he was not justified in refusing to transfer the title to the plaintiff.

Whether the defendant had, or had not, special authority from the court to buy the land for the minor is immaterial. He did buy for her, he agreed to convey it to her when necessary, and this proposition had not been withdrawn when she accepted it and made the tender.

As the defendant has enjoyed the use of this land for a long time, he is not entitled to interest on the amount of the price paid by him, nor is plaintiff bound to refund the amount of the taxes paid by defendant.

The court *a qua* erred in not allowing the reconventional demand of the defendant for professional services and for money advanced to the natural tutrix of plaintiff for her benefit.

Mollie E. Livingston v. D. C. Morgan, 646.

3. Where it appears that the husband of the defendant, who is separate in property from her, was authorized to employ servants for the hotel kept by the defendant and in which she resides, to settle with them and to pay their wages, and that he had general superintendence and sole control and management of the hotel;

Held—That this authority included the power to make a note for the wages due to servants employed in the hotel.

Even without specific powers the agent can bind the principal by drawing bills and signing notes where it is necessary to raise funds to carry into effect the main object of the agency. *A fortiori*, would he have authority to acknowledge a debt due to the employee of a hotel whom he was authorized to employ and to settle with.

The instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, but not of one year, would be applicable.

It being proved that the defendant resided at the hotel during the term the services were rendered by the plaintiff, it must be presumed that she was informed of what her agent did in regard to the settlements with the servants in her employ, and that she ratified his acts, as it is not shown that she ever repudiated them—the plaintiff continuing in her service after the note was given.

Peter James v. Mrs. M. J. Lewis and Husband, 664.

4. The failure of the principal to repudiate immediately, or within a reasonable time, the acts of his agent when informed of them, must be construed into an acquiescence.

Kehlor, Updike & Co. v. Kemble, Hastings & Co., 713.

SEE BILLS AND PROMISSORY NOTES, No. 5—*Charles Zapatha v. Cifreo and Bougere*, 87.

SEE CONTRACT, No. 9—*Stagg v. Belden*, 455.

ALIMONY.

SEE ADMINISTRATOR, No. 11—*Drouet v. Drouet*, 323.

APPEAL.

1. Where the judge of the Superior District Court refused a suspensive appeal from an order rendered by him in a certain suit pending in that court, wherein the relators are defendants—which order was—that their books be produced in court and experts be appointed to examine them on or before the trial of the case;

Held—That from an examination of the record presented, this court is inclined to think that the appeal should have been granted.

State ex rel. Benton et al. v. Judge of the Superior District Court, 57.

2. Where the grounds to dismiss the appeal are, that the right to office is involved, and in such cases, when an appeal is taken, it should be made returnable in ten days after the rendition of the judgment appealed from in conformity with law; that the judgment of the lower court in this case was signed September 20, 1873; that on the twenty-second of the same month the appellants by motion in open court applied for and obtained an appeal returnable on the first Monday of November, 1873;

Held—That the motion to dismiss the appeal must prevail.

State of Louisiana ex rel. Slack et al. v. F. A. Hall, 58.

3. The policy of the law in requiring appeals in cases involving the right to office to be made returnable in ten days after rendition of judgment, is obviously to have such cases determined speedily and with the least possible delay. This requirement of the law must therefore be construed strictly.

The illegality of the return is not obviated from the fact that the appellate court was not in session when the judgment was rendered and not to convene again until the first Monday of November.

Had the appeal been made returnable within ten days as the law requires, the appellant would not have lost his right of being heard on appeal as soon thereafter as the court should be in session. *Ibid.*

4. Where an application is made for the revision of a judgment for five hundred dollars and costs of suit, this court, of its own motion must dismiss the appeal on account of a want of jurisdiction *ratione materiae*.

R. C. Oglesby v. William B. Helm, 61.

5. In order to determine the jurisdiction of the court, the amount in dispute at the time the suit was filed, alone must be considered. Costs, subsequently accruing, can not be estimated so as to give this court jurisdiction. *Ibid.*

6. An action not revisable by an appeal is not revisable in this court by an action of nullity, or by an appeal from the judgment in the action of nullity. *Ibid.*

APPEAL—Continued.

7. This court not having jurisdiction of a judgment because the matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes prescribed by the Code of Practice. *Ibid.*

8. The appeal in this case must be dismissed, because the thing demanded is a sum of money less than five hundred dollars, although the appellant contends that the court has jurisdiction, on the ground that the demand grows out of a contract between the plaintiff and the city of New Orleans for grading and shelling a long street, costing several thousand dollars, and that the validity of the contract is involved.

The obligation of the defendant sought to be enforced involves only the sum of two hundred and sixty-seven dollars and seventy-seven cents. To this extent only the contract in question concerns him. The inquiry here is not as to the obligations of other front proprietors. *James J. O'Hara v. Succession of John Davidson*, 76.

9. The question in this case is whether the judge *a quo* had the right to refuse a suspensive appeal.

This is not the case of a contest as to which of several applicants shall be appointed administrator of a succession, where the necessity of an administration is not questioned, and where the appointment under the law takes effect notwithstanding an appeal.

The question is whether there was any necessity for an administration at all. From a judgment deciding this against them, the heirs had a right to a suspensive appeal to this court.

State ex rel. Heirs of Gee v. The Parish Judge of Claiborne, 122.

10. It is well settled that want of citation of appeal will be cured where the appellee appears and contests the case on any other ground. *Hefner v. Hesse & Verges*, 148.

11. A rule by relator was taken in the court *a qua* to show cause why her opposition to the homologation of the report of certain experts should not be maintained, and an order of sale be rescinded. On trial, the opposition was dismissed, and the application to rescind the sale discharged. The judge *a quo* refused to grant an appeal. Among other reasons for it he alleged that these orders are merely interlocutory, and can not operate an irreparable injury. This is an error. The facts are such as to entitle relator to an appeal.

State ex rel. Mary B. Caldwell v. The Judge of the Fourth District Court, Parish of Orleans, 161.

12. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

Patrick Halpin v. John L. Barringer—W. Woelper, Garnishee, 170.

APPEAL—Continued.

13. It is not necessary that the appellant should sign the appeal bond; but an appeal granted to Elizabeth McQueen and others can not be perfected by an appeal bond signed by M. McQueen, as principal, and C. B. Austin, as security. The surety of M. McQueen can not be regarded as the surety of Elizabeth McQueen.

Succession of William Richardson—Opposition of Elizabeth McQueen et al., 187.

14. When the judge fixed no amount for the appeal bond and a suspensive appeal was granted on giving bond conditioned according to law, the appeal will be dismissed. The amount of the appeal bond is not sufficient for a suspensive appeal, and it will not do for a devolutive one, because it was not for an amount fixed by the judge. *Bridget Bockel et al. v. Joseph Rudman et al.*, 208.
15. Where the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court, the motion to dismiss the appeal must prevail.

C. E. Girardey & Co. v. The City of New Orleans, 291.

16. The order of the court *a qua* dissolving the injunction in this case is one which, in the opinion of this court, might work an irreparable injury to the relator; therefore the relator had a right to appeal from it. The judge below erred in dissolving the injunction.

State of Louisiana ex rel. John T. Hayes v. The City of New Orleans, 304.

17. All the objections urged in this case as grounds for dismissing the appeal, except the last, were waived by failing to file the motion within three days after the return day.

As to the last objection referred to—which is that all the parties interested in the judgment have not been made parties to the appeal, it is untenable. There is in the record an order for an appeal granted on motion in open court, and the bond is executed in favor of the clerk. All the parties who have not appealed are appellees.

Richard Francis v. William Lavine et als., 311.

18. The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute his appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment; nor is it impossible to declare the judgment null and inoperative as to the appellants, and leave it undisturbed as to the others against whom it is rendered.

One judgment debtor has the right to be relieved from an erroneous

APPEAL—Continued.

judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The exception to the jurisdiction of the court below, *ratione materiae*, should have been sustained, the interest of the plaintiff being less than five hundred dollars. Plaintiff has no greater right to annul or injoin in this proceeding the bonds issued by the police jury of the parish of Concordia, than if he were resisting the payment of his tax levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

George L. Walton v. Police Jury, parish of Concordia et als., 355.

19. Where the parties who claimed liens under the law granting a privilege to mechanics being cited, to enable them to establish their claims and receive their *pro rata* of the amount deposited, appeared and contested with the plaintiff, it matters not whether some of the parties received a judgment for the whole of their claims or not. An appeal will lie from the judgment.

William O'Hern v. A. B. Gouldy et als., 371.

20. Where the issue made by a rule to show cause was, whether a judgment rendered against the succession administered by the reglator should be paid and satisfied out of the individual estate of the administrator, on the ground that the administrator refused or neglected to pay it out of the funds of the estate, and that he failed or refused to file an account of his administration; and where the decision was that execution issue against the individual property of the administrator, to be seized and sold to satisfy the judgment against the succession, it is clear that the right of appeal lies from such a decision.

State of Louisiana ex rel. L. C. Rasberry v. Parish Judge of the Parish of Bossier, 385.

21. The motion to dismiss must be overruled. The bond being for the amount fixed by the judge *a quo* is therefore sufficient to maintain the appeal.

John Hughes and Wife v. Charles F. Caruthers. Mrs. Ann M. Hennen, Third Opponent, 530.

22. Judgment having been rendered against both defendants in this suit by an heir against her tutor, who was also administrator, and his surety on the two bonds, the surety alone appealed. The tutor and administrator being an appellee, the prayer of the plaintiff, the other appellee, to amend the judgment against him, can not be entertained.

The question, raised on the merits, that the plaintiff, being a mar-

APPEAL—Continued.

ried woman, was not authorized by her husband to bring this suit, must be considered as settled between the parties by the decision on the motion to dismiss the appeal, which was made on the ground of want of proper parties—the husband not having been joined in the petition of appeal. The suit having been commenced by the wife, assisted by her husband, citation of appeal to her was sufficient. *Mrs. A. E. Deblanc v. F. Levasseur et al.*, 541.

23. The surety on the injunction bond being condemned to pay no damages, has manifestly no interest in the appeal which the plaintiff has taken, the court *a qua* having dismissed the suit on the exception of no cause of action, and the injunction being dissolved without damages, reserving to defendant the right to claim the same on a separate action on the bond.

The decision of this court in this appeal can in no manner affect the surety on the injunction bond, wherefore it would be a vain thing to make him a party to the appeal.

Caroline Richardson, wife of A. Piseros, v. E. R. Chevalley et als., 551.

24. The court below having made an order, in a proceeding to which the defendant was not a party, appointing the plaintiff provisional administrator of the succession of defendant's father in the place of said defendant, the executrix thereof, and putting him in possession of the property thereto belonging, the defendant took a rule against the plaintiff to set aside this interlocutory order on the ground that it was improvidently granted and not warranted by law. The plaintiff appeals from the setting aside of the order.

The plaintiff can suffer no irreparable injury by the decree from which he has appealed. It simply revokes an order disturbing the defendant's possession of the property of her father's estate and permits her to continue to discharge the duties of executrix of the succession until the suit is tried, and it is determined whether she shall be removed from office or not. Whether her administration pending the suit will be beneficial or injurious, is a question which concerns the heirs and creditors, but it is a matter in which the public administrator has no interest. The appeal must be dismissed.

Succession of John K. Elgee. E. T. Parker, Public Administrator v. Bessie Elgee Gaussen, Executrix, 553.

25. The defendant's petition of appeal prays that E. Newman & Co., be cited through Raoul Jumonville, liquidator, to answer the appeal, and accordingly citation was only served on Jumonville. E. Newman was not cited, although he had an interest in sustaining the judgment. The fault is imputable to the appellant. Of the court's own motion the appeal is dismissed.

E. Newman & Co. v. L. H. Levy, 573.

APPEAL—Continued.

26. There are not sufficient causes to dismiss the appeal on the grounds: That the certificate of the clerk is too comprehensive; that the appellant proceeded by rule to set aside the order dissolving the injunction before petition and order of appeal; and that the suit is still pending on the merits in the district court.

Even if the certificate of the clerk could be regarded as defective, because it embraced more than is necessary, that is no cause for the dismissal of an appeal.

It is manifest that the injunction in this case should not have been set aside on bond, as the plaintiff in injunction had alleged and sworn that the sale would work him an irreparable injury. The order setting aside the injunction must be annulled.

Arthur Simon v. Charles H. Walker and Sheriff, 603.

27. As to the sufficiency of the proof to sustain the charge of murder against the defendant, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

State of Louisiana v. Ozeme Fruge, 604.

28. Plaintiff's have failed to allege or show the amount of their interest as taxpayers in the matters involved in this suit, and hence the motion to dismiss this appeal for want of jurisdiction must prevail.

The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars does not show such interest as to give this court jurisdiction.

T. S. Dugan et al. v. Police Jury of the Parish of St. Charles et als., 673.

29. In this instance the application for an appeal was made in writing, and the time for the return thereof by the judge, was the day asked for by the appellants. If they erred, the error was their own, and they must bear the consequence thereof.

Citizens' Bank of Louisiana v. H. Rutz, 747.

SEE BONDS, No. 1—*State ex rel. Taylor v. Judge of the Superior District Court*, 65.

SEE OFFICES AND OFFICERS, No. 6—*Cramer v. Brown*, 272.

SEE PLEADINGS, No. 5—*Whetstone v. Rawlins*, 474.

SEE INJUNCTION, No 17—*State ex rel. Van Norden v. Judge of the Superior District Court*, 550.

ATTORNEY GENERAL.

SEE OFFICES AND OFFICERS, No. 4—*State of Louisiana v. George Russell*, 68.

ATTORNEY'S FEES.

SEE SEIZURES AND SALES, No. 15—*Socha v. Renaldo*, 500.

ATTACHMENT.

1. In the jurisprudence of this State the writ of attachment is considered a harsh remedy, and should not be granted, except where the creditor is clearly entitled to it. The evidence in this case does not make it clear that the defendant was about to convert his property into money or evidences of debt with the intent to place it beyond the reach of his creditors, as alleged, and as the law prescribes.
Bussey & Co. v. J. A. Rothschilds, 258.

2. The attachment in this case was improperly dissolved. The defendant having been sued on an undisputed debt, transferred his plantation upon which he was living, in the fall, before gathering a growing crop, and just as a judgment by default was about to be made final. He transferred it in part payment of a debt due another creditor, and though he received cash enough to discharge the debt sued upon, he failed and refused to apply any part of the money to the payment of the debt; and shortly after this transfer he removed to Texas. These acts authorize the belief that he transferred his property with a fraudulent intent, and justified the attachment.
Goodwell & Webb v. A. F. Minchew, 621.

3. The plaintiffs purchased in January, 1872, from one Robert Stothard, a certain section of land with the improvements thereon. Joseph Stothard was employed to hold possession for plaintiffs. During the same month the place and improvements were attached at the suit of Laura Stevens against said Robert Stothard and taken possession of by the sheriff who appointed Laura Stevens herself as keeper, and she employed Abercrombie, the defendant to take charge of the place as her agent. The seizure was subsequently released by order of Mrs. Stevens, the plaintiff in the attachment suit. The sheriff made his return accordingly, and gave an order to the custodian under him to cease his duties as such. One of the plaintiffs thereupon demanded possession of the defendant who refused to comply with the demand. The defendant being in possession *pro hac vice* as keeper under the sheriff, it was clearly out of his power to acquire a possession adverse to the plaintiffs' rights.

Title does not come into view when the question is purely one involving the right of possession.

Chaffee, Shea & Loye v. George B. Abercrombie, 685.

4. When there is no garnishment the actual seizure of the property is alone the basis of the attachment and jurisdiction of the court. It is the duty of the sheriff to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper.

J. H. Scott v. D. C. Davis et al.—F. B. Davis, Garnishee, 688.

ATTACHMENT—Continued.

5. H. Scott, one of the defendants, was a non-resident and was not cited. The rule which he took to set aside the attachment on the supplemental petition was not an appearance subjecting him to the jurisdiction of the court on the merits. He was not represented by an attorney *ad hoc* appointed by the court, and the judgment maintaining the attachment of his property was erroneous. The reconventional demand of the defendant Marks was not passed upon in the judgment. It was an irregularity.

B. O. Meritz et al. v. H. Marks et al., 740.

6. Brady, a resident of Arkansas, proposed to Phelps & Co., residing in New Orleans, to ship them thirty bales of cotton, if they would furnish him fifteen hundred dollars in money and send him certain merchandise. The proposition was accepted and the contract was then formed. It was a sale of personal property perfected in Louisiana only by delivery. Before the delivery, either actually or constructively, the cotton was attached. Neither the cotton nor the bill of lading was delivered prior to the service under the attachment. Therefore the attachment must be maintained as good and valid.

George W. Bancker & Co. v. John and Hugh Brady, and Everett Lane & Co. v. John and Hugh Brady, consolidated, 749.

SEE SEIZURES AND SALES, No. 4, 5—*Joseph Hoy & Co. v. Eaton & Barstow and Sheriff*, 169.

SEE HUSBAND AND WIFE, No. 16—*Wilson v. Chaleron et al.* 641.

SEE BONDS, No. 14—*Levin et als. v. Lacey et als.*, 270.

SEE PRACTICE, No. 10—*Poutz v. Reggio*, 305.

AUCTIONEER.

1. An auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

Myra F. Minor v. James L. Barker, Auctioneer, et als., 160.

2. This is an action against an auctioneer and his surety on his bond for duties on sales.

The surety should hardly be heard to make such a defense as the one set up in this case—which is, that the bond was not legal at the time of the defalcation alleged against the principal, because said principal had not taken out the license and the oath required by law.

Considering that the principal is proved to have acted as auctioneer and made repeated settlements under oath, as required by law, with the Auditor, showing the amount claimed to be due the State,

AUCTIONEER—Continued.

it is to be presumed, as against the surety, that he complied in other respects with the law.

The prescription of one and two years, based on the act of 1869, p. 45, second section, does not apply. This statute is not understood to release sureties from any liability existing at the date of its passage. *State of Louisiana v. John C. Blohm et als.*, 538.

AUDITOR OF STATE.

SEE EVIDENCE, No. 25—*State v. Succession of Masters*, 268.

BANQUETTES.

1. According to the twenty-fourth section of the present charter of the city of New Orleans, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said petitioners by a written petition addressed to the Council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into in accordance with said petition, to make the banquettes which they were legally bound to make.
2. The plaintiff's contract with the city of New Orleans did not embrace the work for which payment is sought in this suit, and the defendant was making the improvement himself with the assent of the city authorities, when he was interfered with by the plaintiff officiously completing the work defendant had begun, in despite of his opposition.

There may be hardship involved in the result which enriches the proprietor at the plaintiff's expense, but, however it may or should recommend itself to the conscience of the proprietor, it is a hardship of the plaintiff's own seeking, which can not be judicially remedied. *James J. O'Hara v. John Krantz*, 504.

The evidence showing that the work was well done and that the price charged was reasonable, it would be repugnant to every principle of law and equity, to permit the plaintiffs to enrich themselves at the expense of others.

The law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved, and in whose front the banquetting is to be made.

The constitutional objection to the twenty-fourth section of the city charter, on the alleged ground that it imposes a tax which is not equal and uniform, is not well taken. The court does not understand that any tax is imposed by said section, in the technical sense of the word. It merely requires each proprietor to pay for his banquettes, and authorizes them to indicate when the banquette

BANQUETTES—Continued.

shall be made and the character thereof; and, in doing this, the Legislature does not violate any provision of the constitution.

Hermann Daniel et als. v. City of New Orleans, Page & Co., et als., 1.

BATTURE.

1. This suit can not be maintained under the provisions of art. 509, C. C. and section 318, of the Revised Statutes, on which plaintiff relies in claiming the batture to which she alleges to be entitled, inasmuch as she is not a riparian proprietor and does not even own the soil situated on the edge of the water.

Mrs. Wm. A. M. Winter v. City of New Orleans, 310.

BILLS OF LADING.

1. When cotton is on board of a ship and under bills of lading when seized, it must be considered as under the control of the master of the ship, and the master holds it subject to the owners of the bills of lading—who are the intervenors in this case.

B. M. Horrell & Co. v. H. N. Parish, 6.

2. There is no validity in the allegation that the title of defendants is not complete, because the bill of lading is not perfect, inasmuch as when the bill calls for cotton "as marked in the margin," there are no such marks. There was nothing suspicious in the transaction, and the intervenors may be considered as sufficiently prudent when they treated on the pledge of the bill of lading. *Ibid.*
3. A bill of lading is, after all, only the evidence of a contract to deliver property at a certain point, and it is not the marks on the margin therein, or on the property shipped, which give life to the obligation. The marks are given only for the convenience of identification. But in this case there is no question of identity.

Ibid.

4. Another fatal bar to plaintiff's right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was recorded eight days after this suit was instituted. Therefore, plaintiffs had lost their privilege as to the intervenors.

Ibid.

5. The material facts in this case are as follows: The plaintiffs were, in 1871 and 1872, the commission merchants and factors of Wilkinson, who owed them in April, 1872, about \$18,000 evidenced by two notes secured by mortgage, at which date their payment was extended to first of February, 1873. A pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873, to the amount of \$12,000, the planter obligating himself to ship the crop of that year and each subsequent year, if necessary, to pay the said sums with

BILLS OF LADING—Continued.

interest, and all commissions, expenses, etc. In December, 1872, the shipment in question made of hogsheads of sugar and barrels of molasses, marked with the initials of plaintiffs, but without any special instructions from Wilkinson. The plaintiffs received the bill of lading early on the morning of the day of its arrival. A few hours afterwards, on the same day, the sheriff of the parish of Orleans, with a *fi. fa.* from the parish of Plaquemines, in the suit of D. and J. D. Edwards v. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon the plaintiffs claiming the custody and control of the said property to the exclusion of Wilkinson's creditors and as exempt from seizure by them, took an injunction.

The court thinks that the property belonged to Wilkinson, the shipper, and that his creditors might seize, subject to the rights of the consignees to be settled contradictorily with the seizing creditors, inasmuch as the consignees were the agents of the shipper, and their constructive possession under the bill of lading, did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under the *fi. fa.*, or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances.

The injunction was not the remedy to which the plaintiffs were entitled. The sheriff should have proceeded with the sale, leaving the plaintiffs and defendants to settle their respective rights to the proceeds.

Chaffraix & Agar v. W. P. Harper, Sheriff, and D. & J. D. Edwards, 22.

SEE PRIVILEGE, No. 5—*Glover & Odenhall v. G. B. Shute*, 350.

BILLS OF EXCEPTIONS.

1. Where the judge *a quo*, on a rule to show cause, answered: that several days after the rendition of the judgment by the jury, the defendant's counsel importuned him to sign a document tendered to him as a bill of exceptions; that respondent refused to sign the document presented, because it was not a bill of exceptions; that bills of exceptions can only be taken in civil cases during the trial; that they must show upon their face that they were signed at the trial, and that no bill of exceptions will lie after the trial and rendition of a verdict; that the counsel of the defendant on the Saturday previous to the Monday on which the verdict of the jury was rendered, did not ask to be allowed a bill of exceptions to the action of the court;

Held—That the respondent, in the main, assigned reasonable cause for declining to sign the bill of exceptions.

State of Louisiana ex rel. Garthwaite, Lewis & Miller v. The Judge of the Fourth District Court, parish of Orleans, 66.

BILLS OF EXCEPTIONS—Continued.

2. The defendants, except one, who has not appealed with the rest, pleaded certain exceptions and answered to the merits. The case was submitted to the judge on the merits, without his being previously required to dispose of the exceptions. The rule is that the exceptions are considered as abandoned in such a contingency. This rule is not inapplicable because the defendants were not present at the trial. If they desired their exceptions passed upon by the court it was their duty to be present, to urge it, before the case was taken up on its merits.

Richard Frances v. Lavine et al., 311.

3. When default was entered and confirmed in this case, exceptions filed in due time were pending and not disposed of. This was irregular and entitles the defendant to a reversal of the judgment, and an opportunity to be heard on his exceptions.

State of Louisiana v. Francis Vallette, 730.

SEE PRACTICE No. 6—*Denouvion v. Rebecca McNight*, 74.

BILLS AND PROMISSORY NOTES.

1. Plaintiff claims to be the owner of certain notes which were placed by his agent into the hands of Ducros, a broker, to be sold by him, and which he avers that Ducros illegally pledged to the defendant as security for a debt of his own.

That Ducros owed the bank when the notes were put in its possession can not be disputed; that they were given to secure its indebtedness is established; and that the bank had the right to receive them, is equally clear. The lawful possession of the notes by Ducros can not be questioned. Being the lawful possessor, he was, as to third parties, the owner. Being the apparent owner, he could dispose of them; if he saw fit to place them in the hands of the bank in extinction of, or as a security for, a lawful debt, the bank had the right to receive them, and they must remain with the bank until its debt is paid. The responsibility is from Ducros to his principal; and not from the bank to the party who claims that Ducros cheated him.

The burden of proof was on the plaintiff to prove, as he alleged, that the bank gave no valuable consideration for the notes; that it is not the *bona fide* holder thereof; and that they came into the possession of the bank in an illegal and unlawful manner. There was nothing in the transaction beyond the taking by the bank of security for the payment of a pre-existing debt, and this it was authorized by law to do.

Marco Giovanovich v. Citizens' Bank of Louisiana, 15.

2. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does

BILLS AND PROMISSORY NOTES.—Continued.

not come under the exceptions contained in the 494th article of the Code of Practice.

More than a year having elapsed from the last payment of interest to the institution of this suit, the usurious payments which were expressly imputed by the parties to the interest can not now be recovered back, nor imputed to the capital.

James McCracken, Administrator v. James Madison Wells, 31.

3. In view of the facts detailed by plaintiff himself, showing that he and his family, departing from New Orleans, where his usual residence used to be, lived and resided during the war within the Confederate lines, it is evident that plaintiff did not reside in New Orleans on the sixth of April, 1863, the time of the protest of the note on which he appears as indorser, and that, as he had no known place of residence, the notice deposited for him by the notary in the postoffice, pursuant to the act of 1855, was sufficient to fix his liability. *Samuel Jamison v. J. H. Pothaus et als., 63.*

4. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Ibid.*

5. When a note is negotiable, it is competent for plaintiff, in his capacity of agent, to treat the instrument, as between himself and all other persons except his principal, as his own. In this case the defendants have shown no equitable grounds of defense they were entitled to set up against the maker of the note.

Charles Zapata v. Honorine Cifreo and Eliza Bougere, 87.

6. There is no law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

First National Bank of Macon v. B. B. Simmes, 147.

7. Where the note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage, no other proof than possession is necessary.

The plea that the defendant's title to the land purchased and for which the mortgage note was given is not perfect for the whole, can not be sustained. He does not allege that he has been dis-

BILLS AND PROMISSORY NOTES—Continued.

turbed in his possession; that he has been sued; or that he is threatened with a suit for the property. Besides, the parties interested in that question, who were called in warranty, are not before this court. *Ibid.*

8. The defense in this suit, instituted on two drafts drawn by defendant, payable to his own order, indorsed by himself, and accepted by Scott & Jackson, the drawees, is, that they were transferred after maturity and form a part of unsettled accounts existing between himself and the drawees, upon a full settlement whereof their drafts would be found to be paid.

Being in the possession of the drawees after maturity, the drafts were extinguished either by payment or novation, and they became mere *vouchers* for the amounts charged on the books of the acceptors against the defendant, and the acceptors could not resuscitate the drafts or bills of exchange by reissuing them after maturity and after they had taken them up.

Scott & Jackson, the drawees and acceptors, could not have maintained a separate action on those drafts after having carried them through their accounts current with the drawer. Their only action against the defendant was for any balance due on the account of which said drafts formed a part, and the transferee of Scott & Jackson acquired no greater right than they had.

George L. Walton v. Henry C. Youny, 164.

9. The note sued upon in this case was deliberately given, and was secured by mortgage. No fraud is alleged. Whether usurious interest was included in it or not is immaterial under the laws of the State.

Besides, after several partial payments had been subsequently made, a settlement was had, and the defendants, again in writing, acknowledged themselves to be indebted to the plaintiff in the sum claimed.

John J. Carruth v. Carter & Brother, 331.

10. Robertson, the defendant, had drawn two drafts on T. H. & J. M. Allen & Co., made garnishees in this suit, who had verbally accepted the same to be paid, as far as possible, out of the proceeds of the sale of Robertson's cotton, then in their hands. This was a good acceptance, and the intervenors in this case, who are the holders of the accepted drafts, are entitled to have them paid out of the proceeds of said cotton.

James M. Kane v. John W. Robertson, 335.

11. The plea of novation is established in this case. The plaintiff had an account against the New Orleans Manufacturing and Building Company. For this account the note sued upon was given. The

BILLS AND PROMISSORY NOTES—Continued.

account was receipted in full, and the debtors, Fulkerson, McLaurin & Co. were substituted for the old debtor.

David C. McCan v. Fulkerson, McLauren & Co. and the New Orleans Manufacturing and Building Company, 344.

12. The plaintiff claims the value of a carriage and harness he purchased from defendants and left with them on storage. He had paid a portion of the price in cash, and for the balance gave the defendants a note of J. B. Hood to the order of and indorsed by plaintiff which was taken as a payment of the bill for the carriage, and a receipt in full given. The note was not paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights, they had no authority to sell the plaintiff's property which was stored with them subject to his order.

James Longstreet v. R. Marsh Denman & Co., 384.

13. The defendants, successors of Warren, Gilmore & Co., and agents of J. & F. Roberts, who are the drawers of a certain draft, accepted for accommodation by Warren, Gilmore & Co., offered to plaintiffs, indorsees thereof, to pay them within the time agreed upon, a certain stipulated amount for the extinguishment of the draft, which plaintiffs refused to take. No real tender or deposit was made.

The defendants, as the agents of J. & F. Roberts, had a right to tender performance of the contract for said Roberts, and plaintiffs were bound to receive the money in discharge of the contract. The plaintiffs' peremptory refusal dispensed with the actual production of the money or the presence of witnesses as required by article 407 of the Code of Practice, as no one is required to do a vain thing.

Interest, therefore, could be allowed only from judicial demand.

McStea & Value v. Warren & Crawford, 453.

14. The plea of prescription is set up against the suit of plaintiffs based upon the following instrument: "New Orleans, June 3, 1862. Due Messrs. Spearing & Co. six thousand dollars in current funds, subject to their draft or drafts, at not less than sixty days after sight." This instrument is virtually an unconditional promise to pay a specific sum in current funds sixty days after demand. It contains substantially the elements of a promissory note. Therefore the action is barred by the prescription of five years.

Spearing & Co. v. Succession of J. W. Zacharie, 496.

15. Where the indorsers on a promissory note are sued, it is not necessary, when they had filed only a general denial, to prove their signature, the note having been received without objection.

James M. Lewis v. Fairbanks & Gilman and D. & J. D. Edwards, 536.

BILLS AND PROMISSORY NOTES—Continued.

16. This suit is brought on a bill of exchange. The fact that the plaintiffs acquired the instrument after its maturity must determine the case against them. This rule seems to admit of no exception, that a party, taking a bill or a note after its maturity, takes it subject to all the equities and exceptions that might exist between the original parties.

It is a principle of the commercial law that the bare fact that a negotiable instrument is unpaid at its maturity is a circumstance sufficient to raise the presumption of fraud, and that there exists some solid reason why it was not paid.

The law of merchants being the law of honor, all bills and notes, the instruments of commercial transactions, will, if it is presumed, be promptly paid when due.

A negotiable instrument, unpaid at its maturity, shows upon its face that it was dishonored, and a person who takes it can not be allowed to claim the privilege of a *bona fide* holder without notice.

The plaintiff in this case acquired the bill long after its maturity. The circumstances under which the owner thereof was deprived of its possession, precludes the inference that the captors acquired by the rules of war a legal title.

The want of title in any of the parties acquiring the instrument after its maturity, could therefore be set up by the defendants against the holder.

Mrs. Lizzie Clara Davis, wife of Frank E. Mumford, and her minor child, R. E. Smith, v. Bradley, Wilson & Co. 555.

17. The nonpresentation of a check within a reasonable time may, under the circumstances of the case, amount to such laches as will release the indorser thereof. *Simon B. Miller v. M. C. Moseley, 667.*
18. The stamping of the note sued upon was not necessary as the act accompanying the note was stamped.

The objection that the note was not presented at the place of payment at its maturity, according to the agreement of parties, is not fatal. This agreement is not a stipulation in the act of sale and mortgage connected with the note, but was added to the note some time after its date, and authentic proof of a compliance therewith can not be required.

The alleged insufficiency of the stamps, amounting to fifty cents on the act of mortgage, does not invalidate the writ of seizure and sale issued on the evidence of said mortgage act; it is on the authenticity of the evidence that such a writ is based. Here the evidence was authentic, and therefore the order properly issued. If the defendant was injured by the proceeding, she has not adopted the remedy by which her injuries could be inquired into.

J. F. Pargoud v. Mrs. Sarah Richardson, 672.

BILLS AND PROMISSORY NOTES—Continued.

19. Where A, in order to raise money to pay his creditor B, authorized B to draw on him a draft which was accepted and negotiated, but not paid when due ;

Held—That B had a right to expect his draft to be honored and is discharged from all liability on the draft by the laches of the holder in not giving him notice of non-payment.

B. M. Johnson v. F. A. Flanagan et al., 689.

20. When a promissory note was signed in the name of a partnership after the dissolution thereof by the death of one of the partners and the party who signed it was not authorized to do so for the firm but where it was also fully proved that the only member of the firm before the court, in his individual and fiduciary character, acknowledged his liability on the note and promised specially to pay it, and that it was given for a debt of the firm, which he assumed to pay as the transferee of the interest of the other surviving partner ;

Held—That he was, under these circumstances, bound to pay the claim sued on.

Peet, Yale & Bowling v. S. H. Riley & Co. et al., 712.

21. Where the act of mortgage to secure the payment of a note given for a valid consideration by a married woman, separate in property from her husband, was dated on the eleventh of May, the authorization of the judge dated on the tenth, and the note on the first of the same month ;

Held—That though the note bears a different date from the act of sale and mortgage, it was given for a part of the price thereof; that it formed part of the same transaction, and that the authorization of the judge covered the debt in question, which inured to the benefit of the wife.

M. D. F. H. Brooks v. Mrs. M. W. Stewart and Husband, 714.

22. At the maturity of the note sued upon in this case, it was protested without presentation for payment; or demand on any one for payment, and it is not proved that it was impossible to make a demand for payment. This was necessary to bind the indorser.

Union Insurance Company v. Succession of C. W. Rodd, 715.

23. J. M. Alva, as administrator of the estate of Widow Forneret, opened an account in the Louisiana State Bank, which being balanced, July 31, 1862, showed to his credit the sum of \$6038 60 for deposits alleged to revert back to 1858. On the twenty-seventh October, 1865, said administrator gave a check for said amount in favor of the State Treasurer, which was accepted by the Bank. On the twenty-fifth March, 1873, suit was brought by the heirs of Widow Forneret to recover the said balance of deposits in gold,

BILLS AND PROMISSORY NOTES—Continued.

without making any reference to the check for said amount. On the ninth of April, 1873, they filed a supplemental petition making the accepted check the basis of the action ;

Held—That the judgment of the court *a qua*, ordering the check to be paid in United States currency, and not in gold, was correct. But the defendant is only liable for interest from the ninth of April, 1873, the day of judicial demand on the check.

Antonio Partegas et al. v. State National Bank, 728.

24. While a party is before the court in the attitude of the *bona fide* holder of a note, he can legally object to any inquiry into the consideration of the note.

Citizens' Bank of Louisiana v. J. Strauss, 736.

25. Where it is proved that the indorser of a check indorsed it for no other purpose than to identify the person who presented it to the bank, and who was in the habit of collecting for the parties to whose order the check was drawn ;

Held—That the responsibility of the indorser was as to the identity of the collector, but not as to his authority to sign the check for the parties to whose order it was given. The question is to be decided by taking into consideration in what manner and for what purpose he bound himself. For as he bound himself, so will he be bound.

Commercial Press, Smith & Goldsmith, Proprietors, v. Crescent City National Bank—Schultz, Warrantor, 744.

SEE HUSBAND AND WIFE, No. 19—*Koechlin v. Mrs. Thontke*, 737.

SEE CORPORATIONS, No. 8—*Donnelly v. St. John's Protestant Episcopal Church*, 738.

SEE PRIVILEGE, No. 2—*Succession of A. H. D'Meza*, 35.

SEE SEIZURES AND SALES, No. 8, 9—*Johnson v. Dunbar*, 188.

SEE PRESCRIPTION, No. 4—*New Orleans Canal and Banking Company v. Tanner*, 273.

SEE SEIZURES AND SALES, No. 14—*O'Hara v. Folwell*, 370.

SEE HUSBAND AND WIFE, No. 11—*Garner v. Gay and Sheriff*, 375.

SEE HUSBAND AND WIFE, No. 1, 2—*Mrs. Feltus v. Blanchin and Giraud*, 401.

BONDS.

1. It has been so often decided that a defendant may release on bond the sequestration of his property that it can no longer be considered an open question.

The right to appeal from the order refusing this right is equally well settled.

State ex rel. R. Taylor v. Judge of the Superior District Court, 65.

BONDS—Continued.

2. It is not true that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered ex officio by the court under article 274 can not be thus released. *Ibid.*
3. Article 279 C. P. means what it says. Its terms are general, except in cases of failure, any sequestration may be released on bond. Were the meaning of article 279 doubtful, a liberal construction would be given to it, because the article is remedial in its character. *Ibid.*
4. In March, 1868, judgment was rendered in the United States District Court against the steamboat Magenta, Captain Leathers as principal, and against his sureties on a release bond. The plaintiff was one of the sureties. Leathers desired that an appeal be taken, and that plaintiff, Conery, should sign the appeal bond, but Conery was anxious to be released from said bond and from the appeal bond to be signed, and from all liability on the same. Whereupon, to induce said Conery to sign the appeal bond, the defendants gave the bond on which this suit was brought, and the condition of which was to hold Conery harmless from any and all liability on the two bonds, refund to him any sum he might be compelled to pay by reason of the release and of the appeal bonds, and cause the said bonds to be canceled and annulled within one year, and in default thereof to discharge the claim of the libellant in the suit in which appeal was taken.

Defendants plead want of consideration; but Conery may have thought that his interests would be best subserved, at the time and under the circumstances, by taking such a step as would then secure his recourse against the principal on the return bond upon which judgment was already rendered, and that the delay of an appeal would endanger such recourse and fix absolutely his individual liability. It is to protect him against such contingency and release him from all liability in the matter that the bond was given. It constitutes a valid consideration for an obligation.

The amended answer of the defendants shows that the judgment from which an appeal had been taken was reduced, and after becoming final, was paid by plaintiff, Conery, who caused himself to be subrogated to the rights of the libellant. This does away with the plea of the defendants that the suit was premature, inasmuch as nothing had been paid by plaintiff at the time of the instituting of said suit. The defect was cured if it existed.

Under the stipulations of defendants' bond, plaintiff was not compelled, before he pursued them for the reimbursement of what he had paid, to exhaust all recourse against the principal on the release bond. *Edward Conery v. J. W. Cannon et al.*, 123.

BONDS—Continued.

5. Certain blank licenses signed by the State Auditor, which were part of those delivered by him to the defendant, a tax collector, and for which the collector stood charged in the Auditor's books, were offered in evidence to show that neither said Ranson nor his sureties could be liable to pay for said licenses. The court *a qua* properly refused to admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

6. The prescription of two years, pleaded in defense in this case, applies to acts of omission and commission, misfeasance, non-feasance, etc., of the sheriff, as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. The defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes. *Ibid.*
7. Some personal property of Weiss, attached at the suit of Joseph Hoy & Co., was ordered to be sold as perishable property pending the attachment suit and bonds were taken by the sheriff for the price thereof.

The bonds, therefore, simply represented the property attached or the proceeds of the sale thereof, and they belonged to Weiss, not to the sheriff, who was a mere stakeholder. There existed no reason why the sheriff could not seize them at the suit of another creditor, as the property of Weiss, subject of course to the prior attachment.

The suspensive appeal taken by Joseph Hoy & Co. from the judgment dissolving their attachment could not prevent Eaton & Barstow from seizing the property attached.

Joseph Hoy & Co. v. Eaton & Barstow and Sheriff, 169.

8. The judgment of the district court dissolving the attachment of Joseph Hoy & Co. having been affirmed on appeal, said attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure, and the proceeding by garnishment on the part of Joseph Hoy & Co. against the sheriff after said seizure, did not affect it, or the rights of Eaton & Barstow under it—being *res inter alios acta*.

The right to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. had no right to do so. *Ibid.*

BONDS—Continued.

9. When the judge fixed no amount for the appeal bond and a suspensive appeal was granted on giving bond conditioned according to law, the appeal will be dismissed. The amount of the appeal bond is not sufficient for a suspensive appeal, and it will not do for a devolutive one, because it was not for an amount fixed by the judge. *Bridget Bockel et al. v. Joseph Rudman et al.*, 208.
10. The plaintiff has sued Eugene R. Blossat, parish treasurer, and the sureties on his official bond for a certain amount of school funds, and has sought to enforce a legal mortgage for said amount against their property.
The suit being on the bond of the parish treasurer, the prescription of five years pleaded in this court is not applicable.
John Clements, President of the Police Jury of the parish of Rapides v. Eugene R. Blossat et als., 243.
11. As the bond was recorded in the bond book, but not also in the mortgage book in the recorder's office of the parish of Rapides, it did not operate as a mortgage on the property of the defendants, the principal and the sureties on said official bond. *Ibid.*
12. The delay of one, two and three months allowed to the delinquent parish treasurer, to pay over a certain amount of the school funds, was a mere indulgence, and it did not have the effect of discharging the sureties on his official bond, whose undertaking was to be security that he should account for and pay over all school funds coming into his hands as parish treasurer.
Besides, the school board had no authority to make a contract having directly or indirectly for its object the discharge of the sureties on the bond of the parish treasurer.
Furthermore, there was no consideration for the delay granted, and as a contract it was not obligatory. *Ibid.*
13. The court *a qua* did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278, by reason of a voucher showing the fact. The voucher was the best evidence and should have been produced.
There is no force in the objection that the official bond covered the acts of the treasurer only for two years. The funds in question came into the possession of Blossat while he was parish treasurer, and the sureties on his official bond are responsible on account of his failure to pay over the same, regardless of the fact whether his term of office has ceased or not. The conclusion is that the sureties are solidarily bound. *Ibid.*
14. Article 261 C. P., authorizing the sale for certain causes, of property under attachment, does not direct the sheriff to take from the purchasers bonds in the nature of judgments, as in sales under

BONDS—Continued.

executions, and the expressions "to have the force and effect of a judgment at law," used in said bonds, must be considered as mere surplusage. This court knows of no law which gives to such bonds the form of a judgment upon which an execution may issue. Therefore the injunction in this case should have been maintained without prejudice to the rights of parties upon the said bonds.

Julius Levin et als. v. John De Lacy, Sheriff, et als., 270.

15. The plaintiff sues for the sum of \$590 92, the amount of a conditional bond which reads as follows: "That whenever the syndie shall erase the tacit mortgage in favor of the minor Louis Roy, surviving child of Felicien Roy, which exists on the lot of ground and improvements, purchased by Auguste Bernard at the sale of E. T. Parker, syndie v. Joseph Grelier, No. — of the docket of the Second District Court of New Orleans, then and in that case this bond shall have force and virtue."

The defense that the tacit mortgage is not raised can not prevail. It is fully established that by order of court plaintiff paid Grelier the amount of the conditional bond, and that, if the minor ever had a tacit mortgage on the property, it was lost from failure to record the evidences of it prior to the first of January, 1870, under the provisions of the Constitution of 1868.

E. T. Parker v. A. & X. Bernard, 275.

16. In October, 1867, David Grant enjoined the execution of a judgment which his partner, George McGibbon, had confessed against the commercial firm of Grant & McGibbon in favor of R. C. Hyatt, and the defendant, W. R. Bell, signed as security the injunction bond. Before the trial of the injunction suit, Hyatt transferred to the plaintiff, H. Pottier, all his right, title and interest in and to the judgment. The injunction was subsequently dissolved by a judgment in the court below which, on appeal was affirmed in this court.

This suit is brought by Pottier, the transferee, to recover damages on the injunction bond. It is contended by the defendants that there is no privity between them and the plaintiff, because the bond is not in his favor, and the right to claim damages for the illegal injunction was not transferred to plaintiff together with the transfer of the judgment enjoined.

The defense is not well founded. The injunction suit passed as an accessory to the plaintiff with the judgment he bought from Hyatt. After said purchase the plaintiff alone had an interest in resisting the injunction which had but a short time before been taken out, and became the real defendant in said suit, because he was the owner of the judgment enjoined, and the injunction bond,

BONDS—Continued.

although in favor of Hyatt, must be held to be in favor of the owner of said judgment, who acquired the essential right to execute it and also to claim damages for the illegal restraint of the exercise of that right.

H. Pothier v. David Grant and W. R. Bell, 283.

17. The motion to dismiss the appeal on the ground that the bond is not made payable "to the clerk of the court," can not prevail.

The bond is given in favor of H. L. Burns, his executors and administrators and assigns.

The certificate to the transcript shows that H. L. Burns is the clerk of the court, besides other evidence thereof in the record.

Without any evidence this court will take notice of the official capacity of H. L. Burns as a public officer of this State, and will presume that a judicial bond given in his favor was given in reference to that capacity and in reference to the statute requiring the bond to be given in favor of the clerk of the court.

There is no doubt that the bond could be enforced against its makers, having been given in reference to the law, and this is the proper test of its sufficiency. *I. Tharp v. O. V. Wagner*, 317.

18. Seven suits were filed in the Sixth District Court, parish of Orleans, against W. C. Harrison. Judgment being given against him in every case, he took a suspensive appeal in all of them, furnishing his bond with J. S. Simonds as security. Subsequently, to save costs, it was agreed between the parties to the suits, that only one record should be made up and filed in the Supreme Court, and that its decision in that case should be the judgment in all the other cases.

It is impossible to see how or why the surety was, as contended, released by that agreement. The case which was decided was a test one; it was identical with the other cases not filed in the Supreme Court in virtue of the agreement aforesaid, which did not affect the suspensive appeal taken. It only dispensed with making more than one transcript, to avoid unnecessary costs.

Succession of John Sheldon Simonds, 319.

19. The State, on the petition of the Attorney General, having joined the Auditor and the Treasurer from issuing warrants for the payment of and from paying certain obligations of the State, and having prayed to have the appropriations therefor and the said liabilities declared null, the New Orleans, Mobile and Texas Railroad Company intervened and moved to dissolve the injunction so far as it applied to the bonds of the State issued to said company. The grounds of the injunction were that the appropriation for the payment of the coupons of said bonds is a disguised donation of

BONDS—Continued.

the funds of the State to a private corporation; that the Governor had no authority to subscribe for the stock of said company and that the act 95 of 1871, by virtue of which the said bonds were issued, attempted to create a debt exceeding \$100,000, without providing adequate means for its payment as required by article 111 of the State constitution, and also in excess of the constitutional limitation to the State indebtedness.

It is contended, on the other side, that the State can not sue to annul the bonds in question without first tendering back the stock which it is admitted has been received by the State in exchange for the bonds.

The doctrine of tender could not be properly applied to this case.

The State does not seek to annul the contract and recover back the bonds given as the price. The law officer of the State simply asks that her fiscal agents be prohibited from paying certain bonds and coupons, on the ground that the law which authorized their issuance is unconstitutional.

The suit was not against the holders of the bonds, or the parties to the contract, and there was no one to whom the tender of the certificate of stock could be made. The injunction or prohibition issued on the petition of the Attorney General, made it legally impossible, while it existed, for the fiscal agent to pay, and in this way only were the rights of the intervening company affected, and the necessity imposed upon the company to take some legal proceedings to obtain payment. They chose to intervene in these proceedings in order to assert their rights and remove the obstructions to their access to the State treasury. They are therefore not in a position to plead that a tender of the stock should have been made to them before the issuance of the injunction herein, although it practically closed the treasury to them. But any judgment in the suit to which they were not made parties, would not have been *res judicata* as to them.

This case must be remanded for further evidence and such proceedings as may be appropriate.

State of Louisiana v. Charles Clinton, Auditor, and A. Dubuclet, Treasurer. New Orleans, Mobile and Texas Railroad Company, Intervenor, 346.

20. There is no law which prohibits a member of the bar from becoming a surety on a sequestration bond. If there be any rule of court to the contrary, it is not known on what authority it rests.

John F. Daly v. E. E. Duffy and Schoenhausen, 468.

21. It is a rule of our jurisprudence that if a shorter prescription is not specially applied to personal actions, they are not prescribed by

BONDS—Continued.

two years. There is no law fixing specially the prescription of actions against recorders.

This is an action against the recorder of the parish of Morehouse and the securities on his official bond for the damages resulting from a failure of official duty by the deputy recorder in not reinscribing a certain judgment within the proper time, as he, the deputy, was specially instructed to do, by which omission the debt due plaintiff was lost. This action is one *ex contractu*.

The recorder had a special duty to perform, embraced within the obligation of his bond given according to law with two good securities, and his failure or that of his deputy, duly appointed to perform that duty, is a breach of his bond on which he and his deputies may be sued.

The argument that it is not an action on the bond, because it is not established that the consent of the sureties was given to the appointment of the deputy, which was necessary to make them liable, and that its omission shows the action to be one against the recorder alone for his negligence, is not sound. It might perhaps result in releasing the securities on the trial, but can not change the character of the action.

Damages *ex delicto* flow from the violation of a general duty; damages *ex contractu* are the consequence of the breach of a special obligation, such as the special obligation imposed by law on the recorder, in this case, to reinscribe a certain judgment.

The recorder and his securities had entered into a specific contract with the State, for the benefit of those interested, that he and his deputy would faithfully perform each duty of his office, and his failure in such respect is a breach of that contract. The action to which it gives rise is not prescribed by one year.

In this case, the deputy recorder promised to perform a special duty as requested on behalf of plaintiff, and the latter had the right to suppose the promise and duty would be observed by the officer. The failure of the plaintiff to go afterwards (as it would have been prudent for him to do) to see that the officer had done his duty, is not such a negligence, under the circumstances, as to affect his right of action against the defendants. The other allegations of negligence against the plaintiff have no force.

The objection that plaintiff or his attorney should have furnished the recorder with a certified copy of the judgment for reinscription and tendered the fee, if of any force under the circumstances, is removed by the promise of the deputy to make the inscription without requiring such copy or fee.

The argument, on behalf of the sureties, that they can not be con-

BONDS—Continued.

demned to pay, because the recorder did not obtain their written consent to the appointment of the deputy, as provided by law, can not avail one of the securities who is himself the deputy. As to the other, the matter should have been specially pleaded. It is raised for the first time, in this court, under the general issue.

J. H. Brigham, Curator, v. A. L. Bussey et al., 676.

22. A certain quantity of cotton sequestered at the suit of plaintiff, who claimed \$772 55 from Grant, his employer, was released upon a bond on which defendant went surety, and a judgment was rendered against Grant in favor of plaintiff, by consent, for \$532, with privilege. After the issuing of a *fieri facias* and the return of *nulla bona*, the defendant being sued to make him responsible as surety on the bond;

Held—That the admission of Grant that he owed a certain sum—less than the sum claimed—for which amount judgment was rendered, did not release the surety on the bond from paying the judgment which he had agreed to pay, should judgment be rendered against the principal on the bond. The defendant was not surety for any debt due by Grant to plaintiff, but had merely bound himself to satisfy any judgment which might be given.

Dodson Harrell v. John G. Sanders, 691.

23. The objection that a privilege can not be given by consent is not to be taken into consideration, because the plaintiff's right to recover does not rest upon the privilege which was granted to him by the judgment, but on the judgment itself.

The defense that defendant is not responsible on the bond, which, it is alleged, has none of the features of a legal bond for the delivery of property sequestered, is not valid. The bond must be considered with reference to the law under which it was given. No matter what the parties choose to call it, the law designates it as a forthcoming bond, and as such it must be regarded. *Ibid.*

24. The surety on a release bond is responsible only for the value of movables, when not delivered according to the stipulations of the bond after judgment in favor of the plaintiff. It is only when the property is land that the law fixes responsibility for revenues.

Jean Segassie v. Antoine Piernas et al., 742.

SEE LAWS, No. 1—*Commissioners of Immigration v. C. L. Brandt et als.*, 29.

SEE AUCTIONEERS, No. 2—*State v. Blohm et als.*, 538.

SEE CRIMINAL LAW, No. 20—*State v. Herpin*, 612.

COLORED PERSONS.

1. Under the first section of the civil rights act, the sixth article of the constitution of the United States, and the State constitution

COLORED PERSONS—Continued.

of 1864, title 1, art. 1, Cornelia Hart, a colored person, was vested in November, 1867, with the right to enter into a contract of marriage, and her marriage at that epoch with C. E. Hart, a white man, was clothed with all the formalities required by law—which marriage, if there existed any doubt as to its validity, would have to be considered as ratified and confirmed by art. 149 of the State constitution of 1868.

In 1867, when the marriage of Cornelia Hart was effected, the incapacity attaching to her children under former laws, of being legitimated on the ground of the legal inability of their parents to contract marriage at the time of the conception of the children, had been obliterated.

It is considered well settled that other modes of the acknowledgment of illegitimate children, besides that by notarial act, are authorized by the laws of this State. Any alteration made in the Code of 1870 as to this matter, could not affect the rights of the children of Hart, which were fixed in 1867.

The fact that C. E. Hart, now deceased, had acknowledged as his children the issue of his cohabitation with Cornelia, is sufficiently established to enable this court to decide that they were capable of inheriting from their father at the time of his decease in 1869.

Cornelia Hart, Tutrix v. Hoss & Elder, Administrators. T. E. Hart v. the same. (Consolidated.) 90.

SEE MARRIAGE, No. 1—*Succession of Henderson Randall*, 163.

COMMUNITY.

1. Under no circumstances, according to our jurisprudence, can the plaintiffs recover any portion of the community property, sold for a community debt, without first paying or tendering the amount by which they have been benefited from the price thereof paid by the purchaser.

Harriet B. Kellogg et als. v. J. V. Duralde, Sheriff, et als., 234.

2. The plaintiff sues defendant for the balance of an account for supplies furnished to make a crop, which he alleges inured to her benefit. It was incumbent on plaintiff to prove that the articles thus furnished had inured to the benefit of defendant, as alleged, but he has failed to do so. Besides, this court is satisfied as to the correctness of the defense—which is—that the debt is a community debt for which the defendant, who was a married woman, can not be held responsible.

Frederic Fluke v. Mrs. Mary A. Martin, 279.

3. This suit is instituted by the plaintiff against the purchasers at sheriff's sales, he claiming that the property was community property and belonged equally to his father and mother; that when

COMMUNITY.

his mother died the community was dissolved; that his mother's share descended to him; that his title thereto has never been divested; and that he should now be quieted therein.

The property was sold to pay community debts. Therefore the plaintiff's claim must be rejected.

Samuel Ricker v. Widow and Heirs of John H. Pearson, and Samuel Ricker v. Annie C. Diggs, now Ross, 391.

4. The court below did not err, as contended by the opponents, to the tableau of the administratrix, in not charging the community existing between the deceased and his surviving widow with a certain sum of money received by the deceased, during marriage, from the sale of his separate property, because it is not proved that this money was expended by the deceased for the benefit of said community.

Whether the individual debts of the deceased were discharged by the giving in payment of certain slaves belonging to the community existing between the deceased and his surviving widow, administratrix, of his estate, or by funds arising from the sale of said slaves, the result is the same. The community should be credited for the amount of its property disposed of for the individual benefit of the deceased.

Hypolite Belair, Natural Tutor, et als. v. Celina Dominguez, Administratrix. Opposition of the heirs to the tableaux filed by the administratrix, 605.

SEE ACTION, No. 11—*Daniel v. Ivy et als.*, 639.

SEE HUSBAND AND WIFE, 3, 4, 5, 6—*Hawley, Administrator, v. Crescent City Bank et als.*, 230.

COMPROMISE.

1. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Samuel Jamison v. J. H. Pothaus et als.*, 63.
2. The act by which the annuity for life claimed in this suit was established, seems to have been a compromise between the parties interested in the succession of plaintiff's husband—one of the conditions being that she should withdraw her application to be appointed administratrix thereof, and that the payment of said annuity might be made either by Henry Boyce or the heirs of Mrs. Irene Boyce. This agreement was subsequently carried out by them partially by making payments thereon.

COMPROMISE—Continued.

This is a contract which the parties could legally make. They are bound by it. The loss to the defendants of the property of the succession of Irene Boyce can not affect plaintiff's rights. It was a clear transfer of the interests in and to their succession, which she had the right to sell and the defendants to purchase. If the property perished, or was taken from them, the loss was theirs.

But there is error in that part of the judgment which condemns Powhatan Clark, the husband of one of the defendants. He was not a party to the contract, and his wife entered into it before he married her. The property claimed in his intervention can not be made responsible for his wife's obligation contracted before marriage. The community which had existed between them had been dissolved.

Mrs. Emily M. Archinard, Widow v. Mrs. Louise Boyce, Wife of Powhatan Clark, Intervenor, and Henry A. Boyce, 292.

3. Compromises have no immunity from decrees of nullity, where errors of fact bearing upon the principal cause of the compromise and coupled with fraud, are shown to exist, and in such cases, said compromises must be declared null and void.

J. Q. Packard v. Ober, Atwater & Co. J. Q. Packard v. Ober, Atwater & Co., Garrard & Craig, and John P. Moore. (Consolidated.), 424.

4. This is a suit to recover a certain piece of land on the ground that the plaintiffs were unjustly deprived of it by illegal proceedings, among which was a certain compromise executed by their tutor. All the proceedings complained of were duly homologated and confirmed. The power to effect the compromise was conferred upon the tutor by a family meeting. The clerk, in rendering the order of homologation, had the authority to order the tutor, in pursuance of the directions of the family meeting, to carry out the compromise. The authorities in support of transactions of this kind are numerous in our own jurisprudence.

Mahle et al. v. Elder et al., 681.

SEE HUSBAND AND WIFE, No. 9—*Barron v. Sollibellos, 289.*

CONSTITUTION.

1. Article 123 of the State constitution does not impair the obligations of contract, and is not violative of the constitution of the United States.

E. Rochereau & Co., in liquidation v. D. H. Delacroix. On third opposition of Mrs. Stephanie de Livaudais, wife of D. H. Delacroix, 584.

2. Before the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council

CONSTITUTION—Continued.

which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void. *City of Shreveport v. L. A. Levy*, 671.

3. The constitutionality of that provision, making the decision of said board of assessors final as to "the valuations in the assessment rolls," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised. *State of Louisiana v. Widow J. C. de St. Romes*, 753.

SEE TAXES AND TAX COLLECTORS, No. 24—*State v. Ray*, 674.

No. 29—*Morrison v. Larkin*, 699.

No. 30—*City of Shreveport v. Jones*, 708.

CONFISCATION ACT.

SEE LAWS AND STATUTES, No. 22—*Micou v. Benjamin and Day*, 718.

CONTRACT.

1. Where a contract has for its consideration an illegal currency reprobated by law, the plaintiff suing on that contract can not recover. *Jacob Denney v. L. L. Johnson*, 55.
2. A large lot of furniture having been sold by plaintiff to defendant, for which part payment has been made to a considerable amount, plaintiff sues for the balance due on the same or for the restoration of the property. Defendant, avowing her own infamy, maintains that she is not bound by a contract *contra bonos mores*, as it was to the knowledge of plaintiff that the furniture was bought for the purpose of keeping a house of prostitution. The defense can not be accepted. The knowledge of the plaintiff of the immoral use for which the furniture was purchased did not violate the contract.

Eliza V. Mahood v. Ida T. Tealsa, Wife, et al., 108.

3. In March, 1862, plaintiff and defendant entered into partnership by written agreement to transact an importing business, principally between certain ports in Europe and the Island of Cuba, the profits and losses to be equally divided between them. The partnership was to be continued during the year, and went into operation according to agreement. After the war, Wallis sues for one-half of a certain amount of partnership property remaining in the hands of defendant. The defense is that the contract was entered into with the view of running the blockade, and is therefore null and void, its object being an illicit one.

This court sees nothing illicit in the contract itself, and does not think that the defendant has shown that the partnership funds which came into his hands were the result of an unlawful traffic.

John S. Wallis v. E. B. Wheelock, 246.

CONTRACT—Continued.

4. Defendant's refusal to fulfill a certain agreement with the Citizens' Bank in relation to the sale of a plantation to said defendant, on the alleged ground of an error of fact in the agreement, can not avail him.

Error is said to be the greatest defect that can occur in a contract, but the error must be in respect to the object of the agreement, the identity or quality of the subject. That is called error of fact which proceeds either from ignorance of that which really exists or from a mistaken belief in the existence of that which has none.

In this case the error as to the value of the property which defendant agreed to buy, was no error of fact, but if it existed an error of judgment. This is an error for which the law furnishes no relief. Besides, certain allegations of the defendant in reconvening for damages resulting from the pretended noncompliance of the bank with its allegations, contradict his own allegations as to his error about the value of the property.

It is not in the power of this court to force defendant to comply with his contract. The penalty he incurs for violating it, is the damage he has occasioned.

Citizens' Bank of Louisiana v. Clarence L. James, 264.

5. Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. This court is not satisfied that he was employed by the year. Besides, on his being paid for the time he worked at the rate of \$1500 per annum, he took the money without objection. *Victor Tanner v. S. Cambon*, 353.
6. This case originating in the dismissal of the employe by the employer is governed by article 2749 of the Civil Code.

William J. Taylor v. Kehler, Updike & Co., 369.

7. The plaintiff employed defendant to construct a house for him according to contract. Defendant, before completing the work abandoned it and left the State. Having put defendant *in mora*, plaintiff employed other workmen to complete the job at the expense of defendant. There are various claims by material men for materials furnished to the contractor and used in erecting plaintiff's building, who has instituted this action to avoid a multiplicity of suits and bring together the various claimants *in concursu* for the purpose of having their rights and privileges adjusted, and to have the sum of \$527 deposited by him in court distributed pro rata among the several parties—said amount being the balance due, as he represents, to the defendant under the contract, and which should go pro rata towards paying the material men their claims, for which he alleges that defendant is bound.

This court is satisfied that the claims of certain of the material men

CONTRACT—Continued.

in whose favor judgment was given against O'Hern personally, were debts contracted by Gouldy, against whom the bills were made out; that credit was given for the materials to the contractor Gouldy, and not to O'Hern, the owner of the lot. Therefore the alleged promise of plaintiff to pay these claims can not be proved by parol. There is no ground for a personal judgment against the plaintiff for the amount of those claims.

William O'Hern v. A. B. Gouldy et als., 371.

8. The jurisprudence of this State is settled upon the point of the slave consideration in contracts, and this court will not disturb it.

William J. McLean v. A. Foster Elliot et als., 385.

9. The managers of defendant's business, during his absence, had employed the plaintiff as clerk in his store, at the rate of two thousand dollars per annum, to begin on the first day of March, 1870, with a proviso that, if his services were not found satisfactory by defendant, the engagement would be canceled on the first day of April, on paying to plaintiff one hundred and fifty dollars for his services in March. This contract was to be ratified by defendant, then absent. He returned on the thirteenth of April, and on the twenty-fifth of the same month, he discharged the plaintiff, whose claim under the contract is the object of the present suit.

If the managers of defendant's business had no authority to employ plaintiff, their act should have been repudiated immediately. It was unfortunate for defendant, if his agents failed to give him correct information of the contract, but it was not plaintiff's fault. Besides, when defendant returned to his store on the thirteenth of April, and found the plaintiff employed as clerk, it was his duty to inquire concerning the terms upon which his agents had engaged his services. Nothing of the kind, however, was done by him, until he concluded to discharge plaintiff on the twenty-fifth of April. His silence from early in March till the twenty-fifth of April, must be regarded as a tacit acceptance of the employment of plaintiff.

John P. Stagg v. F. Belden, 455.

10. A certain sum was deposited in the hands of Rogers by Mrs. Williams to induce him to sign a bond for the release of her husband, who was prosecuted for the embezzlement of funds belonging to Ponder—which money thus deposited Rogers was to return to her or to her order as soon as he became released from his bond. The prosecution was discontinued, the release from the bond was thereby effected, and an assignment of the funds deposited was made by Mrs. Williams to the plaintiffs, who sued Rogers on his refusal to pay the same.

CONTRACT—Continued.

Such an agreement on the part of the prosecuting witness, one of the plaintiffs, is one which a court of justice should not recognize and enforce. The agreement was that if the money embezzled should be returned, he would not prosecute the offender. This can not be the basis of an action in a court of justice to compel one of the contracting parties to comply with the contract; and, as set out in the petition, the demand of the counsel of the accused is so connected with this illegal contract, that it can not be granted.

The plaintiffs had a legal remedy by which their civil demand against the defendants could have been enforced. The action here is not against the depository on the simple assignment of the depositor; for both the depositor and the depository are sued *in solido*, and the effect of the suit is to enforce the consideration for the discontinuance of the prosecution.

A. P. Field and Jesse R. Ponder v. W. N. Rogers et als., 574.

11. A contract made in bad faith can not be rescinded unless it operate to the injury of the party complaining. A sale may be fraudulent and simulated, and yet not injure the complaining creditor.

Marcellin Gillis v. J. D. Dansby et al., 711.

SEE MORTGAGE, No. 4—*Fleitas v. Consolidated Association of Planters of Louisiana et als.*, 223.

SEE BONDS, No. 12—*Clements v. Biossat et als.*, 243.

SEE DAMAGES, No. 1, 2—*Campbell v. Miltenberger*, 72.

SEE EVIDENCE, No. 26—*Burbank v. Pierce*, 295.

SEE TAXES AND TAX COLLECTOR, No. 10—*Barthel v. city of New Orleans*, 340.

SEE INSURANCE, No. 9—*Pike v. Merchants' Mutual Insurance Company*, 392.

SEE NEW ORLEANS, No. 5—*Coleman v. City of New Orleans*, 451.

SEE SUCCESSION, No. 2—*Netter v. Herman and Levy*, 458.

SEE EVIDENCE, No. 33—*Billgery v. Schnell and Joachim*, 467.

SEE LEASE, No. 5—*Trisconi v. Dumas & Victor*, 477.

SEE BANQUETTES, No. 2—*O'Hara v. Krantz*, 504.

SEE CORPORATIONS, No. 8—*Eddy v. City of Shreveport*, 636.

SEE SUCCESSION, No. 3—*Pool v. Mrs. Alexander and Husband*, 669.

CORPORATIONS.

1. The officer of a company must be presumed to know its by-laws adopted before his appointment, and is bound by them as to his tenure of office. They have become the law between himself and his employers. By one of their by-laws the defendants had reserved the right to remove their officers at pleasure. Plaintiff is an officer in the sense of the said by-law, and therefore can not complain.

George W. Hunter v. The Sun Mutual Insurance Company of New Orleans, 13.

CORPORATIONS—Continued.

2. It has been frequently determined that police jurors are political corporations whose powers are specially defined by the Legislature, and that they can legally exercise no other powers than those delegated to them.

For all purposes for which they are by law authorized to create debts, they are authorized to levy and collect a tax for paying the same. But, without a special grant of power by the Legislature for that purpose, they clearly have no authority to issue and put in circulation instruments of any kind.

Stephen C. Sterling v. Parish of West Feliciana, 59.

3. No special statute is shown in this case conferring upon the parish of West Feliciana the authority to issue the negotiable notes or warrants upon which the plaintiff sues.

The position that the warrants or negotiable instruments of indebtedness which are the objects of this suit, were issued to defray the necessary expenses of the parish is not tenable. The police jury was not authorized to do it in any other way than by levying and collecting a tax for that purpose. Said negotiable instruments are null and void.

Ibid.

4. The important question in this case is: Has act No. 77, of the legislative session of 1870, entitled "An Act to authorize the stockholders of the Loan and Pledge Association" to change the name of the incorporation, and to grant certain privileges to said association, been properly accepted?

The answer must be in the negative. The acceptance of an act which fundamentally changed the character of the institution, should have been by the unanimous consent of the stockholders. The assent which was given by a majority is not sufficient.

Legislative alterations of the charter of a private corporation, when merely auxiliary and not fundamental, may be adopted by a majority of the corporators, and such acceptance will bind the whole; but if such alterations be fundamental, the acceptance must be unanimous.

State ex rel. Attorney General v. Accommodation Bank of Louisiana, 288.

5. A municipal corporation possesses two classes of powers and two classes of rights—public and private. In all that relates to one class, it is merely the agent of the State and subject to its control. In the other, it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature—its creator. Among this latter class is the right to acquire, hold and dispose of property—to sue and be sued, etc.—just as certain rights

CORPORATIONS—Continued.

are conferred on private corporations and persons, not *sui juris*, such as minors and married women, but are not afterwards, as long as they exist, under the control of the Legislature.

A municipal corporation may own property, to and over which the Legislature has, while said corporation exists no right or control in opposition to or independently of the will or consent of the corporation.

It is a manifest fact to all that the incorporation of such a city as New Orleans is a necessity. The multiplying and complicated interests of the compact and increasing community are such that the Legislature can not administer them; and some of them are of such a nature as not to be within mere legislative action, but are to be conducted under general rules, thus necessitating the creation of an intellectual body, with something more than governmental functions, but which do not constitute an *imperium in imperio*.

If then a municipal corporation can acquire the fee simple of property, the squares intended for the depots of the plaintiffs were so acquired, and they can not be taken by the Legislature, while the city corporation exists.

The Legislature expressly recognized and ratified the compromise of September, 1820, between the city and certain riparian proprietors in relation to the property in question, imposing conditions which were complied with. The theory that the city acquired the property simply as the agent of the State can not be accepted, because the city can own private property, and because the former owners intended to, and did, by the act of twentieth June, 1851, transfer the title thereof to the city, subject only to the uses of commerce and of the public, while so needed.

The injunction in this instance was improperly issued against the defendant—the city of New Orleans—but as the city has made no claim against the plaintiffs, a demand in reconvention can not be admitted, and a decree inhibiting the plaintiffs from occupying the property in controversy could not be granted.

Under the pleadings, all that can be done is to render judgment in favor of the city dissolving the injunction and dismissing plaintiffs' suit, leaving the parties to their rights, under the laws relative to the expropriation of property.

New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans et als. Charles Morgan, Intervenor, 478.

6. The plaintiffs sue on an open account to recover salaries as Commissioners of Waterworks, and commissions on two millions of dollars for adjusting and settling the accounts between the Commercial Bank and the City of New Orleans.

CORPORATIONS—Continued.

On the thirty-first of July, 1868, the resolution which authorized the appointment of the plaintiffs was adopted. Neither that resolution nor any other resolution, law, ordinance or contract fixed any salary or compensation for the services of said commissioners. None, therefore, can be claimed. There is no implied obligation on the part of the municipal corporations, and no such relation between them and the officers whom they are required by law to select, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law, ordinance or contract.

A. W. Bosworth et als. v. City of New Orleans, 494.

7. If the Claiborne Manufacturing Company was insolvent when Nicholson, one of the defendants, obtained his judgment, which is now sought to be annulled, it does not appear that he knew it. Had he known it, there was no reason why he should not have prosecuted his claim. The board of directors had expressly authorized the president of the company to confess judgment in Nicholson's favor. This they had the authority in law to do.

Thomas B. Killgore v. M. P. Nicholson et als., 633.

8. The City Council of the city of Shreveport having under its charter the right to purchase property, had the right to secure the credit portion of the price by stipulating a mortgage and the vendor's privilege on the property purchased in favor of each vendor and agreeing not to prejudice the right of mortgage and privilege by any alienation or incumbrance, and to pay the costs or fees incurred by the vendors in enforcing their rights thus preserved. These were all incidents of the contract of sale.

The very fact that the city purchased the property for the purpose of donating it to the Texas and Pacific Railroad Company for their *depots*, made it the more prudent in the vendors to require the pact *de non alienando*, and militates against the presumption of their consenting to waive it.

If there could be any doubt about the authority of the mayor to represent the city in those sales, and to make the stipulations referred to, his acts were ratified by the acceptance of the transfers and the donation of the purchased property to the railroad company, in which the several acts of sale were referred to.

The attempted exclusion in this act of donation, of any intention to ratify the onerous stipulations under consideration, was without effect against the vendors. The contract of sale as a whole was ratified.

C. C. Edey v. City of Shreveport. Gregg & Ford v. The same. Steers & Carlton v. Same. S. B. Steers v. Same. W. Johnston & Co. v. Same. (Consolidated cases.), 636.

CORPORATIONS—Continued.

9. The objection to the testimony of a witness on the ground that it could not be introduced to establish a fact which could only be shown by the minutes themselves of a corporation, was not well taken. It has been determined that the neglect, incompetence, not to say dishonesty of a corporation in making up its minutes, can not exclude an interested third party from proving the truth by parol.

In this instance it is clear that the act of executing the note sued upon was ratified by the vestry, and it is unimportant whether, at the time of executing it, the persons who did so had a special authorization or not.

Charles Donnelly v. St. John's Protestant Episcopal Church, 738.

SEE GARNISHMENT AND GARNISHEES, No. 4—*Smith v. Durbridge and Crescent City Live Stock Landing and Slaughterhouse Company*, 531.

SEE EVIDENCE, No. 46—*Kilgore v. Willis et al.*, 665.

SEE TAXES AND TAX COLLECTORS, No. 24—*Slack v. Ray*, 674.

No. 30—*City of Shreveport v. Jones*, 708.

COURTS.

1. The same reason upon which the power of the Legislature rests to increase the number of courts in New Orleans, exists for the power it possesses to decrease the number.

Article 83 of the constitution of 1868 announces that the General Assembly may establish in New Orleans as many district courts as the public interests may require, wholly irrespective of any particular number of courts. It may diminish or increase that number according to its discretion.

If it be granted that article 83 of the constitution must be considered and interpreted in connection with the other articles of the same instrument on the same subject matter, to wit: articles 81, 84, 97, 110, 122 and 158, it is important not to overlook that article 83, so far as relates to the organization of the district courts of New Orleans, is express and special. It is a well recognized rule that general legislation does not control special legislation on the same subject matter.

All those articles which treat of district courts, tenure of office, removal of judges, etc., as a general subject, must be subordinated to article 83, so far as their provisions are in conflict or inconsistent with the special provisions of article 83, in relation to the district courts of New Orleans. By this rule it is possible to harmonize, and give effect to, each and every one of the articles that have been enumerated, instead of becoming bewildered in a labyrinth of difficulties, vainly endeavoring to limit and circum-

COURTS—Continued.

scribe the special provisions of article 83, by giving a controlling power over them to the general provisions of the other articles.

The abolishment of the court over which the relator presided was a legislative act, which the General Assembly of Louisiana had the constitutional power and right to perform. That act was not an *ex post facto* law. There was no obligation or contract violated. It was simply the exercise of a power and discretion with which the General Assembly was clothed before and at the time the relator came into office.

State ex rel. T. Wharton Collins v. Charles Clinton, Auditor, 406.

SEE JURISDICTION, No. 1—*Louis Parker v. Shropshire & Anderson, 37.*

SEE OFFICE AND OFFICERS, No. 1, 2—*Thos. Lynne v. City of New Orleans, 48.*

CRIMINAL LAW.

1. The indictment for perjury in this case is fatally defective. It does not charge that the question which the defendant is alleged to have answered falsely was material to the case then being examined by the grand jury. It does not set forth the substance of the offense; nor charge that the defendant willfully made oath to a statement of material fact, which statement was false.

State of Louisiana v. Henry Gibson, 71.

2. The judge *a quo* was right when he refused a continuance in order that the prisoners might obtain testimony from Europe to establish the fact that the man alleged to have been murdered was the nephew of one of the accused. The relationship of the parties has nothing to do with the guilt or innocence of the accused.

The State of Louisiana v. Didio Baptiste and Francis Martini, 134.

3. The judge did not err when he ordered that the witnesses for the State and the prisoners be separated, except the physicians. Dr. Jackson, being the coroner, was called to testify as such; Dr. Bemiss and Dr. Beard, being required as medical experts as to the cause of death were permitted to remain to hear the evidence in order that they might form an opinion as to the cause of death.

Ibid.

4. The court *a qua* did not err in permitting Ward to testify as a witness. The objection was that he had been found guilty of two crimes, and had been sentenced to the penitentiary and to the parish prison; that he had been pardoned after his sentence had been completed; and that his pardon was not sufficiently proved.

Ibid.

5. It matters not whether the pardon came before or after the term of confinement had expired. There are disabilities which are the

CRIMINAL LAW—Continued.

consequences of conviction, and remain after incarceration has ceased. The doctrine well recognized on this subject is, that a pardon gives to the person to whom it is granted a new character, and makes of him a new man. When extended to him in prison, it releases him and removes his disabilities; when given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities. *Ibid.*

6. A communication from the Secretary of the Senate to the Acting Governor, informing him that his recommendation for pardon had been received, and that it had been acted upon favorably, is sufficient evidence of the completeness of the pardon. *Ibid.*
7. The judge *a quo* did not err in permitting the physicians, as professional experts, to recapitulate to the jury the evidence they had heard, and which constituted the reason and foundation for their opinions in relation to the mode of death of the deceased.

The objection that they were physicians in the employ of two insurance offices which had each a policy on the life of the deceased, may go to their credibility, but does make improper their answers to the questions propounded. *Ibid.*

8. The jury, after being two days and two nights deliberating on their verdict, came into court, and through their foreman asked the court for further instructions as to the weight to be given to circumstantial evidence; and the court having briefly charged the jury that they were bound to act on circumstantial evidence as much as on any other evidence, and being about to send back the jury to the room for further deliberations, the counsel for defendants asked the court to give the jury a more explicit charge as to the character of the circumstantial evidence which was entitled to consideration by them. The court interrupted the counsel, and absolutely refused to hear what he had to say, or even to permit him to address the court upon the right of asking for additional charges on the particular information wanted by the jury.

On this point it is obvious that the judge *a quo* erred, and that he refused to the prisoners a most important, and, in this instance, vital right. *Ibid.*

9. The objection that the proceeding by information against the defendant was illegal on the ground that it was violative of the fifth article of the Constitution of the United States which declares—“That no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury,” is not well taken. The provisions of the Constitution of the United States in relation to trials by jury apply only to the Federal courts. *State of Louisiana v. Frank Carro, 377.*

CRIMINAL LAW—Continued.

10. The charge in the indictment that the defendant did feloniously and violently seize, take and carry away, etc., "the sum of one hundred dollars in paper currency of the United States of America, of the goods, property and chattels of," etc., is sufficient. It is a substantial compliance with the provisions of the statute. Revised Statutes, section 1061. *Ibid.*
11. The objection that the name of one C. R. Schaffer is indorsed on the verdict as foreman of the jury, when it does not appear elsewhere that a man of that name served upon the jury, is without weight. The name of C. A. Shaffer appears on the list of jurors who sat on the trial. The discrepancy in the letter of the middle name is clearly a clerical error. *Ibid.*
12. The point in this case is, that the judge erred in refusing a new trial on the showing made that one of the jurors was a British subject, and therefore incompetent to sit at the trial.

The record contains no mention of the reason of the judge for refusing the application for a new trial—whether because he found the fact not satisfactorily established, or whether, as a question of law, the defendant was not entitled to it—conceding the fact to be satisfactorily proved.

If the finding of the judge *a quo* was based on a question of fact, it can not be revised by this court, because, in criminal cases, only questions of law are conizable by this tribunal. But assuming that the finding of the judge in refusing a new trial was upon a question of law, the conclusion of this court is that he was correct. The defendant, duly served with a list of the jurors by whom it was proposed that he should be tried, had ample opportunity to consider any objection he might have to their capacity or competency, and he should have made whatever objection he had at the time each juror was offered.

In his affidavit for a new trial, the defendant states that he did not know the fact of which he complains till after the trial. If he neglected to ask the juror at the time he was offered whether he was a citizen or not, it was a neglect of which he can not now complain.

State of Louisiana v. William L. Bower, 383.

13. The defendant alleges that the words "paper currency of the United States," do not describe the statutory offense of robbery. The charge in the indictment is the felonious and violent taking of "the sum of seventeen hundred and forty-five dollars in paper currency of the United States of America." This comes within the law. R. S. sec. 810.
- The objection that the words "promissory note of the value of three hundred dollars," do not conform to the statute, because not

CRIMINAL LAW—Continued.

showing that it was for the payment of any specific property, is not well founded.

Section 1051 makes it sufficient to describe "the instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing."

This law, as stated in 10 An. 230, cited by defendant, is an exception to the general rule of the common law as to description, and is complied with in the indictment here.

The defendant's bill of exceptions to the refusal of the judge to grant a continuance to enable the counsel appointed to represent him to prepare the defense, can not be maintained. It seems there were three days between the appointment and the trial. This is sufficient time when no special cause is shown for longer delay, nor is such a delay essential in itself.

No law authorizes to move for attachments against absent jurors on the list, in order to bring a greater number, when there are enough present to complete the panel. It is a matter in the judge's discretion; and the non-attendance of some of the jurors summoned and not excused, is not good cause for refusal to go to trial.

The judge *a quo* did not err when refusing to admit an affidavit against the wife of the defendant, charging her with receiving stolen property, being a part of the property described in the indictment. It was introducing a new issue from the one at the bar.

State of Louisiana v. O. H. Shonhausen, 421.

14. There was no error in refusing to allow the defendant to propound to his own witness certain questions which are specified in his bill of exceptions. If intended to impeach the witness, they were not allowable to the party introducing him, Otherwise, they were irrelevant to the issue.

The court instructed the jury in the general charge that: "To constitute robbery there should be actual or constructive force." This was correct, and substantially what the counsel asked.

The court was also asked to charge that, "in the proof of taking, it is necessary to show that the goods were actually in the possession of the accused." The court, in giving the charge, added the words, "or constructively" after the word "actually" and before the word "in." There was no error in this.

The bill of exceptions to permitting a witness to refer to his books, out of the presence of the court, in order to refresh his memory, was not well taken.

The jury found the accused guilty of robbery and larceny on the indictment containing the two counts, and hereupon, on motion of

CRIMINAL LAW—Continued.

the Attorney General, a *nolle prosequi* was entered on the second count as to larceny, and the accused was discharged therefrom. There is no error in this proceeding. *Ibid.*

15. The offense for which the accused was tried is not prescribed, because the indictment was not filed within a year after the crime had been committed. The statute merely says that the indictment must be found within a year after the offense was made known to the public officer having power to direct investigation and prosecution.

The law does not say that, because the foreman of a grand jury can not write his name, the indictment found by the grand jury of which he is foreman shall not be good.

After a motion for a new trial which has been refused, it is too late to urge in arrest of judgment that the jury were guilty of misconduct, partiality and prejudice against the accused.

The judge *a quo* did not err in refusing to permit the introduction in evidence of the certificate of the *post mortem* examination given by the physician who made it. There is nothing to show that the physician himself could not have been procured. His testimony, if it could be obtained, was the evidence required, and not his certificate. *State of Louisiana v. E. B. Tinney*, 460.

16. The ruling of the judge admitting the voluntary confessions of Fontaine made to the witnesses, who happened to be a constable and a justice of the peace, as against himself, was correct. But the declarations of Fontaine were inadmissible against Monie, and the judge should have instructed the jury to limit the application of said admissions to Fontaine alone.

State of Louisiana v. Theophile Monie and Joseph Fontaine, 513.

17. The refusal of the judge to order the separation of the witnesses is a matter within his sound discretion.

The judge *a quo* was correct in refusing to charge that, "if from the nature of the assault, Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife and was at the time of the killing being inflicted upon her person, then the killing was in self defense." This would have required the judge to assume the fact that the assault upon his wife was without provocation, for if the wife was the aggressor, the killing would not be excusable in self defense.

The judge *a quo* did not err when he refused to charge the jury, "that they must take into consideration the crippled condition of the accused." The cripple was not assaulted, and his being a cripple did not give him any greater right to kill one who assaulted his wife, than other men possess.

CRIMINAL LAW—Continued.

There was no error in the charge of the judge *a quo* that the principle decided in the case of Selfridge by the Supreme Court, "was the law of Louisiana, whenever there is any application to the case."

The judge *a quo* correctly refused to charge, in regard to the dying declarations of the deceased, "that the statement must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented from any cause from making, they will not be received." The defendant's counsel did not object to the admission of said declarations, but on the contrary used them, and referred to them as evidence in the argument before the jury.

State of Louisiana v. E. A. Giroux and C. Giroux, 582.

18. The prisoner requested the judge to reduce his charge to the jury to writing. This he refused to do. The request was made before the charge was delivered. To the judge's refusal a bill of exception was taken. The exception must be sustained.

The State of Louisiana v. John J. Gilmore, 599.

19. The absence of part of the jurors at the time and when the case was called for trial, in no manner deprived the defendants of the opportunity of inquiring into the character and qualifications of the jurors. A sufficient number of jurors being present to form the panel, the court did not err in ruling the defendants to trial.

Having had all the notice the law requires in order to prepare their challenges, the defendants were not entitled to a postponement of the trial, because all the jurors summoned for the term were not present.

The State of Louisiana v. William Hoozer et als., 599.

20. Where the appearance bond by the defendant in a criminal prosecution was taken and approved by the parish judge before whom the preliminary examination was had, the fact that there is no order committing the defendant for trial before the district court, nor any order admitting him to bail, nor fixing the amount of the bail, can not avail in assignment of error.

Where it is manifest in the record that the word August is written by mistake for July, it is a mere clerical error which is controlled by the context and accompanying documents.

While the court was in session, the fact that the petit jury and witnesses in criminal matters were discharged for two or three days at a time, on different occasions during the said term, did not release the defendant from the obligation of his appearance bond.

State of Louisiana v. Sosthene Herpin, 612.

CRIMINAL LAW—Continued.

The verbal admission of the accused ought always to be received with great caution. Besides, it is a rule of evidence that the whole admission is to be taken together. In this case the witness only heard part of it. The evidence should have been rejected.

The State of Louisiana v. Eli Gilcrease, 622.

SEE JURIES AND JURORS, No. 3, 4—*State of Louisiana v. Austin E. Smith*, 62.

SEE JURIES AND JURORS, No. 5—*State of Louisiana v. Gaetano Rosa and Rosa Rosa*, 75.

DAMAGES.

1. The plaintiff knew, as a chemist, that his iron fence, for which he had contracted with defendant, was joined together with material which would necessarily go to ruin, and he saw the ruin commencing within a year after the work was completed. It was then that he should have compelled the defendant to do his work in a proper manner.

It is not sufficient that plaintiff should have repeatedly called the defendant's attention to the bad condition of the fence; he should, as he could, have forced him to a compliance with his contract, and should not have waited seven years to claim, as damages, a greater amount than the fence originally cost. He is only entitled to recover from the defendant the amount which it would have cost to put the fence in a proper condition when it was first discovered that the material used was not suitable for the purpose for which it was intended.

Geo. W. Campbell v. O. A. Miltenberger, 72.

2. The prescription of one year is not applicable to this case. It applies only to cases arising from damages caused by the commission of an offense or *quasi* offense. *Ibid.*
3. Mere words spoken, however much they may be calculated to excite and irritate, do not justify an assault and battery. The law, in deference to human infirmities, concedes something in favor of an accused party, where it is shown there was great provocation, and in civil actions such provocation may go in mitigation of damages but never in justification of the unlawful act.

Josiah B. Richardson v. James E. Zuntz, 313.

4. Plaintiffs, judgment creditors of Canale, caused their execution to be levied on certain movables. Mora enjoined the sale, claiming to be the owner of the property seized. The injunction was dissolved in the court below, and the judgment was affirmed in this court with twenty per cent. damages against the principal and surety *in solido*. Pending the appeal, the sheriff improperly released the seizure, and Mora sold the property at auction.

DAMAGES—Continued.

Plaintiffs bring this suit for damages resulting from the illegal release of the seizure by the sheriff and from the improper injunction by Mora, and pray judgment against them *in solido* for the amount of their judgment against Canale, which they failed to realize by reason of the illegal acts of the sheriff and Mora. The sheriff calls in warranty Mora and the sureties on his injunction bond.

It is not possible to discover what obligation Mora and his surety have contracted towards the plaintiffs. This suit is not on the injunction bond. The injunction was dissolved, and with damages granted to plaintiffs against the principal and surety *in solido*. The illegal release by the sheriff accrued subsequently to the injunction, and did not result necessarily from the exercise of that writ. That Mora disposed of a judgment debtor's property, after it had been released from seizure, did not create a legal obligation against him in favor of the judgment creditor of the party whose property he had disposed of.

There is also no legal obligation to be enforced under the call in warranty. The principal and surety on the injunction bond did not contract to warrant the sheriff against the consequences of his own illegal acts.

Cohen & Wilson v. George W. Avery et als., 359.

5. If the defendant Harispe is responsible to the plaintiff, it is because his agent took possession of plaintiff's property and shipped part of it to Cuba on Harispe's account, and part of it to Harispe at New Orleans. If this possession was a wrongful one, as it is alleged to be, the property came into his hands by reason of an offense which he, through his agent, had committed. His obligation towards the plaintiff would rest upon a claim for damages caused by tortious conduct and is the result of an offense which is prescribed by one year. The prescription invoked in this court by the defendant must therefore prevail.

George Wood v. Charles Harispe, 511.

6. The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars does not show such interest as to give this court jurisdiction.

T. S. Dugan et al. v. Police Jury of the Parish of St. Charles et als., 673.

7. Damages are considered an equivalent for the loss sustained by the delay consequent on the appeal. Hence no damages can be awarded when it does not appear that an appeal delayed plaintiff in executing or collecting his judgment.

Elizabeth Crofts v. Jeremiah Moynihan and Patrick Irwin, 727.

DAMAGES—Continued.

8. This is a suit against the defendants, Mayor and Aldermen of the city of Jefferson, for damages resulting from the infliction of a wound on plaintiff by a mob of rioters composed, in part at least, of the police of the city of Jefferson officially appointed by defendants;

Held—That as it is not alleged that defendants were present, aiding, abetting the so-called rioters, or that they, or either of them, inflicted the wound, which is the basis of plaintiff's claim, there is no cause of action. *John Spalding v. J. J. Kreider et als.*, 743.

DOMICILE

1. In view of the facts detailed by plaintiff himself, showing that he and his family, departing from New Orleans where his usual residence used to be, lived and resided during the war within the Confederate lines, it is evident that plaintiff did not reside in New Orleans on the sixth of April, 1863, the time of the protest of the note on which he appears as indorser, and that, as he had no known place of residence, the notice deposited for him by the notary in the postoffice, pursuant to the act of 1855, was sufficient to fix his liability. *Samuel Jamison v. J. H. Pothaus et als.*, 63.
2. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Ibid.*

SEE JURISDICTION, No. 12—*Bradley & Co. v. Woodruff et al.*, 299.

SEE WILLS AND TESTAMENTS, No. 2, 3, 4—*Rongger v. Kissinger*, 338.

SEE DOMICILE, No. 32—*Stephenson v. Broadwell*, 387.

SEE TAXES AND TAX COLLECTORS, No. 11—*Mrs. George v. Campbell*, 445.

SEE SHERIFF, No. 4—*Rau v. Katz et al.*, 463.

SEE INJUNCTION, No. 16—*Butchers' Benevolent Association v. R. King Cutler*, 500.

SEE OBLIGATIONS AND LIABILITIES, No. 4—*Wilson v. Benjamin et als.*, 587.

DONATIONS.

1. It is sufficiently clear from the tenor of the will on record, that the testator had the desire to give the seizin to the executrix. Any disposition or recommendation from the testator to his executor in regard to the mode in which his property is to be administered is

DONATIONS—Continued.

a sufficient indication of his desire to grant the seizin. It is not necessary that the word seizin be inserted in the will to confer the power.

The executrix is entitled to credit for interest paid to procure extensions of mortgage notes, it not being shown that she had moneys in hand sufficient for the purpose of taking up the notes of the deceased when the renewals were made. It was important to the interest of the estate that they should be taken up.

The sum of \$21,500 reported by the auditor in this instance, as amount of sales of property of the separate estate of the deceased during his last marriage and charged against his widow, was properly rejected by the court below, as there is no evidence to show that the proceeds of that property inured to the benefit of the community.

It is expressly announced by article 1749 of the Civil Code that "all donations made between married persons, during marriage, though termed *inter vivos*, shall always be revocable." The restoration by the wife to the husband of the various articles donated to her and the subsequent conversion of them by him for the uses and benefit of the community may be regarded as a revocation or an annulment of the donation.

Succession of Thomas Hale—On opposition to account of Executrix, 195.

2. Apart from the disability of the husband and wife to enter into a contract with each other, except when the law expressly permits it, the promise or engagement of the husband to return to his wife the value of the articles donated back to him, by replacing them with others of the same kind and of the like value, could only be regarded as an imperfect obligation at best, and one that can not be enforced by law. It did not have the binding force of a legal obligation against the husband and neither can it have against his heirs.

A donation made in money, in the form of the manual gift, is valid without the formality of a notarial act of transfer.

There is no foundation for the assertion that the provisions of article 1749 apply to donations by public act and not to manual gifts which require no formalities after delivery. This court is unable to discover in our code any exception to the rule laid down in article 1749.

It is contended that, if by the act of donation from the husband, the money became hers absolutely, then by operation of law, article 1753 of the Civil Code, the ownership of said money changed, and was vested in the heirs in consequence of the wife's second mar-

DONATIONS—Continued.

riage. The court thinks that articles 1746, 1750 and 1752 must be construed together with article 1753, to which latter article the three former ones are subordinated, and that their operation is contingent upon the conditions expressed in the article 1753, which is not found in the Napoleon Code, but which was incorporated into our system of laws from the Roman law and Spanish Codes.

Ibid.

3. The attitude of the parties to this litigation would seem to present a case provided for by the article 1753 of our Code. During the marriage large and valuable donations were made by the husband to the wife in the form of the manual gift. The husband died, leaving children by his marriage with the donee, who has contracted a second marriage, the children of the donor still living. But in this case the conclusion of the court is that the provisions of article 1753 can not be enforced, for the reason that the substance of the donation is no longer tangible nor susceptible of identification. The property, of which the ownership, under such circumstances, becomes vested in the children, must be the same property that was donated to the wife by the husband during the marriage.

In this case, the money constituting the particular donation under consideration, has long since been used by the executrix, the donee, for the benefit of herself and family. It is no longer *in esse* as to the rights of the opponents. The ownership of it can not be enjoyed by the children nor the usufruct of it by the mother. Hence the executrix can not be held liable for it.

Ibid.

4. Plaintiff, revoking the donation which he made to his wife of a certain piece of property, seeks to recover possession of said property from defendant, whose title is derived from plaintiff's wife under the donation aforesaid.

It appears that Mrs. Wade desired to donate the property in question, thus donated to her, to her daughter, Mrs. Eames, "as an extra portion over and above her legitimate share in the succession of said donor," estimating it at \$7000, and to secure the title it was specially stipulated in the act, "that the said donor binds herself and her heirs to warrant and forever defend the said property against all legal claims and demands whatsoever." To this act the plaintiff was a party, approving of it and authorizing his wife. He is therefore estopped from disputing the title of defendant.

Besides, the prescription of ten years invoked by defendant, is a complete bar to the action.

Henry F. Wade v. David W. Eames, 449.

SEE MORTGAGE, No. 6—*Succession of Cordevielle v. Dawson, 534.*

DRAINAGE.

1. It is impossible to consent to the proposition that, because private property may not be in use by the owner, it may be violently and illegally taken from him by another, with the view even of subserving the interest of said owners.

Canal and Carondelet Navigation Company v. Commissioners of First Drainage District of New Orleans, 740.

SEE NEW ORLEANS, No. 2—*State ex rel. Gagnet v. Administrator of Public Accounts*, 336.

ESTOPPEL.

1. Plaintiff, after having accepted the benefit and status conferred upon him by Pierre Monette in the act of marriage which legitimated him, can not attack the act creating his own status, and under which he is asserting his rights, by questioning the validity of the same rights conferred upon one who is recognized as his brother and also legitimated in the same document. The very words which establish the legitimacy of plaintiff, establish also the status of the defendant. He can not accept the benefits of an act and repudiate its obligations.

Succession of Pierre Monette, 26.

2. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

3. The plaintiff, being ejected from his office of mayor of the city of Jefferson from the first of June, 1869, to the first of April, 1870, when the office ceased to exist by annexation of said city to the city of New Orleans, obtained by compromise, in a suit resulting from the unlawful interference with his rights, the sum of \$1500 from the party thus interfering under an appointment made by the Governor. This sum was paid out of the funds of the city of Jefferson, and the plaintiff now claims from the city of New Orleans, as successor of the city of Jefferson, the same amount for salary; Held—That the compromising by plaintiff of the said suit, in which his right to the office was involved, concludes him from urging any demand against the city of New Orleans for his salary, admitting the liability of the city to pay a salary twice for the same services.

J. J. Kreider v. City of New Orleans, 342.

4. The widow and heirs of Jean Pardo claim a house and lot, formerly belonging to A. A. Pardo, on which the deceased had a mortgage, and which, in 1858, he bought at an auction sale ordered by the

ESTOPPEL—Continued.

Second District Court under insolvent proceedings in consequence of the bankruptcy of A. A. Pardo, the defendant in this case, who was, however, permitted by the purchaser to retain possession of the property.

The defense set up that the price paid for the property was money which the deceased was owing to defendant, is utterly without foundation.

The defendant, in the face of the schedule which he filed in bankruptcy as syndic of his creditors, and which is verified by his own oath, can not be heard setting up an account against his brother extending back to 1840, eighteen years previous to his insolvency and which is not mentioned in the schedule. He is estopped from denying the truth of his oaths and judicial admissions in the insolvent proceedings.

If the account aforesaid was a valid claim, it should have been put on the schedule as an asset of the insolvent. If he colluded with his brother in suppressing this claim and allowing him to carry off the property as first mortgage creditor, this court will not aid him in seeking to derive a benefit from the fraud.

The Widow and Heirs of Jean Pardo v. A. A. Pardo, 364.

5. The judgment referred to as an estoppel against plaintiff's action, did not impose upon her the condition to claim certain pieces of property in kind, to which she might be entitled, but reserved her right to the proceeds in case she failed to recover said property. She has alleged and shown that the title of the purchasers was maintained in several suits she instituted. She therefore can exercise her second right.

The objection that the security can not be sued for the proceeds, no step having been previously taken to fix the liability of the principal, is not well founded.

This objection was not made in the lower court, but the surety adopted and joined in the defense made by the principal, and, on trial, the plaintiff showed by the returns of *nulla bona* on one or two *feri facias* for small sums, that further process against the principal would be unavailing.

Mrs. A. E. Deblanc v. F. Levasseur et al., 541.

6. The objection to the introduction of plaintiff's testimony as a witness to prove in her own behalf that she was not a member of a certain firm, was properly sustained. If not estopped by her own declarations in an authentic act and in judicial proceedings, plaintiff's testimony could not have availed to show that she was not a member of said firm against her own solemn declarations in those instruments that she was.

Mrs. E. V. Elbert and Husband v. Wallace & Co. and J. A. Liddell, sheriff, 705.

ESTOPPEL—Continued.

7. One who has availed himself of a judgment and made it his own by issuing a *feri facias* and collecting money thereon is estopped from denying its validity.

Heirs of M. W. Ashley, deceased, v. Adam Riser et al., 711.

8. A party can not be permitted to allow his property to be sold under a judicial process and then claim the proceeds under the allegation that he did not owe the debt which the property was sold to pay.

Horatio Weedon et als. v. Arthemise Landreaux et als., 729.

SEE DONATIONS, No. 4—*Wade v. Eames*, 449.

EVIDENCE.

1. A broker who acted for both parties in a transaction, and his son, who attended to the business at his office, were both competent to testify with regard to what passed between said parties, and to prove certain conversations and statements, to which a bill of exceptions was taken, on the ground that they were made out of the presence and hearing of the parties objecting thereto.

The court does not see why a man should not be allowed to testify in a civil matter, because his testimony may show that he has been guilty of an offense against the laws of the State. This is an objection which he alone could make.

B. M. Horrell & Co. v. H. N. Parish—Louisiana National Bank, Intervenor, 6.

2. A bill of lading is, after all, only the evidence of a contract to deliver property at a certain point, and it is not the marks on the margin therein, or on the property shipped, which give life to the obligation. The marks are given only for the convenience of identification. But in this case there is no question of identity.

Ibid.

3. The burden of proof was on the plaintiff to prove, as he alleged, that the bank gave no valuable consideration for the notes; that it is not the *bona fide* holder thereof; and that they came into the possession of the bank in an illegal and unlawful manner. There was nothing in the transaction beyond the taking by the bank of security for the payment of a pre-existing debt, and this it was authorized by law to do.

Marco Giovanovich v. Citizens' Bank of Louisiana, 15.

4. Where the bill of exceptions was to the putting of leading questions by the Attorney General to one of the witnesses under the pretense that the person testifying was an unwilling witness, and without having first propounded preliminary questions to the witness, and without a refusal by the witness to answer questions propounded to her in legal form on the examination in chief, which

EVIDENCE—Continued.

was permitted by the court, and all the leading questions were answered by the witness; and where the judge *a quo* subjoined to this statement in the bill of exceptions his own statement why he had permitted this course:

Held—That the circumstances which induced the judge *a quo* to permit the mode of interrogation used by the Attorney General constitute matter of fact which it is not necessary to examine, as upon the bill of exceptions the court thinks the ruling correct.

State of Louisiana v. Gaetano Rosa and Rosa Rosa, 75.

5. In this instance the defendant offered in evidence the petition in the case entitled "Succession of Jose Maria Caballero," and the judgment of the Second District Court and of the Supreme Court, decreeing her to be the legitimate child of the deceased. The plaintiffs objected on the ground that they were not bound by the judgment, not being parties to the suit.

The objection was correctly overruled. It was not a judgment *inter partes*, but a judgment *in rem*, and is evidence of the facts adjudicated against the world.

The judge *a quo* properly rejected the testimony taken by commission of witnesses not named in the interrogatories or commission. The party called on to cross question witnesses when testimony is taken by commission, is entitled to be informed of the names of the witnesses in order to know how to shape his questions.

The court below was right in not granting a continuance on the ground of the rejection of the above mentioned testimony, the party offering it not having made due diligence to get the evidence.

The plea of *res judicata* must stand. It is well settled that a final judgment of a court of competent jurisdiction as to the *status* of a person, is *res judicata* as to all the world, and the force and effect of *res judicata* is to make black white, and the crooked straight.

Gertrudiz Bonella and Caballero et als. v. Charles Maduel, Testamentary Executor, et al., 112.

6. Certain blank licenses signed by the State Auditor, which were part of those delivered by him to the defendant, a tax collector, and for which the collector stood charged in the Auditor's books, were offered in evidence to show that neither said Ranson nor his sureties could be liable to pay for said licenses. The court *a quo* properly refused to admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

EVIDENCE—Continued.

7. Oral evidence was properly admitted to show the relationship of two witnesses and of plaintiff to her deceased uncle, whose will she wishes to be declared null and inoperative, and the disappearance of plaintiff's father and his age.

Under this proof the presumption arises that plaintiff's father is alive; and there being no proof of his death, the plaintiff can not represent him, nor accept and claim through him the succession of her deceased uncle. She is therefore without capacity or interest to attack the will of the deceased.

Mrs. P. Boe v. E. Filleul, Testamentary Executor, 126.

8. There is no law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

First National Bank of Macon v. B. B. Simmes, 147.

9. Where the note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage, no other proof than possession is necessary. *Ibid.*
10. The plea that the defendant's title to the land purchased and for which the mortgage note was given is not perfect for the whole, can not be sustained. He does not allege that he has been disturbed in his possession; that he has been sued; or that he is threatened with a suit for the property. Besides, the parties interested in that question, who were called in warranty, are not before this court. *Ibid.*

11. Where there is no note of evidence on the subject in the record, the rule is that the judge who condemned the defendants as commercial partners solidarily on their note, did so on proper evidence.

A. Hefner v. S. Hesse and H. Vergez, 148.

12. The objection that the partition among certain heirs is void, on the ground that it was not evidenced by a written act, is unsound, when they went into possession and were permitted to prove by parol the division or partition.

John W. Johnston v. Gustavus & Hypolite Labat, 159.

13. If it be granted that a partition is virtually a sale of each heir to the others, of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection. *Ibid.*
14. Where the objection was that the plaintiff alleged that the indebtedness of the defendant arose from family and plantation supplies

EVIDENCE—Continued.

furnished in 1870 and 1871, that the first item appearing on the plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first January 1870, was not, and did not purport to be for such supplies, and was too general and indefinite to admit of proof;

Held—That the objection was well taken and that the testimony offered should have been rejected.

The husband of defendant was the manager of the *Verona* plantation belonging to her, prior to her being separated from him by judicial decree in October 1869. During that year he received supplies from the plaintiff, and the sum of \$3970 charged, as before stated, as the first item on the account sued upon, is inferred to be, for the most part, for the supplies of 1869. It is in proof that for the period of 1870 and 1871, for which the supplies are charged, she had always refused to supply the laborers on her place, which was leased out to them, and had neither authorized her husband nor any other person to contract for supplies. The plaintiff can only have judgment for \$303 18, as the amount of articles established as furnished to defendant and which went to her individual use.

Joseph Moore v. Mrs. Inez Routh Gordon, 167.

15. On the amended rule taken on Mrs. Pipes, administratrix of the estate of her deceased husband and tutrix of her minor children, to show cause why a certain piece of property mortgaged to secure a promissory note indorsed by the deceased, should not be sold for payment of the same, after the plaintiff had introduced his evidence consisting of the note, the confirmation of Mrs. Pipes as natural tutrix, the account on which he figures as a creditor, its publication, and the judgment homologating the same, the defendant offered evidence to establish the allegations in her answer, to wit: That she had never filed any account, and that no one was authorized to file one for her. The plaintiff objected to the reception of this evidence, on the ground that it was attacking the judgment collaterally. The judge *a quo* maintained the exception. It was an error.

The defendant merely sought to show that the judgment upon which the plaintiff relied, was in reality no judgment against her. The plaintiff having rested his case upon the judgment, the defendant was authorized to show that the judgment had no foundation to stand upon. It is now a well recognized doctrine that one may use as a shield, what he can not use as a weapon.

Succession of James W. Pipes, 203.

16. Objection was made by defendants to the introduction of a diagram marked A, on the ground that, in an action of boundary, an

EVIDENCE—Continued.

official and authorized survey only can be made the basis of proceeding, and that the diagram being a private instrument or act of the plaintiff, is inadmissible. The court *a qua* admitted the diagram to be used by the witnesses on the stand to show the *locus in quo*, and the boundary in dispute. This ruling was correct under the pleadings. The plaintiff had the right to show the existence and locality of the alleged ancient line of division between the lands of the parties by parol evidence, and the diagram was admissible to enable the witnesses to render their testimony intelligible to the court and jury. *E. Boedicker v. John East et als.*, 209.

17. The objection to the admission of evidence showing that John East had pointed out to plaintiff in 1871, the line in question as the established boundary, was not well founded. John East is one of the defendants, and the husband of Frances East, the owner of the land, and seems to have acted for his wife. *Ibid.*
18. A bill of exceptions was taken to the admission of testimony introduced by the plaintiff to disprove a statement made by one of his own witnesses. The testimony was admissible. It was offered not to impeach, but to rebut. This court understands the rule to be, that although a party introducing a witness is not permitted to impugn his character for veracity, and to show that he is not worthy of belief, he may nevertheless introduce evidence to rebut a statement made by the witness as to a particular fact. *Ibid.*
19. Assuming that a husband acted as the agent of his wife in matters connected with the general administration of her affairs or business, it must be shown that he had authority, express and special, sufficient to bind her by his promise to pay the debt of a third person. *Baker & Thompson v. Mrs. A. L. Pagaud*, 220.
20. Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol. It must be in writing, the law is prohibitory, and this court can not recognize any other proof to establish the fact. *Ibid.*
21. The court *a qua* did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278; by reason of a voucher showing the fact. The voucher was the best evidence and should have been produced.

John Clements, President of the Police Jury of the Parish of Rapides, v. Eugene R. Blossat et als., 243.

22. The written acknowledgment of a debt need not be stamped before it can be received in evidence.

In this instance, the note described in the act acknowledging the indebtedness, and interrupting prescription as alleged, is not sufficiently identified as the one sued upon—which it was incumbent

EVIDENCE—Continued.

on the plaintiff to show. It was his duty to make out his case positively and he has not done so.

Charles E. Alter v. John McDougal et als., 245.

23. The copy of an act of sale of a lot and house under private signature, attested by two witnesses, one of whom made oath before the recorder of the parish of the execution thereof and of the signature of the parties to the act is sufficient to prove title to real estate, but the original must be produced and the signature proved, giving the privilege to the defendants of admitting or denying the genuineness of the signature. The evidence should have been rejected.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 248.

24. The question in this case is whether the sale, in consequence of which the note sued upon was given, is one *per aversionem*, or per acre.

On the trial, the court below did not err in receiving in evidence, offered by plaintiff, the deeds of sale from the Citizens' Bank and from the sheriff to him, in which the boundaries of the land sold were described.

It follows from said evidence that it was the sale of a plantation described in certain deeds wherein the boundaries were specifically set forth, with all that was upon it, for a certain price for the whole.

It was a sale *per aversionem*, and not per acre. The plaintiff purchased by boundaries and sold by boundaries within which the number of acres is described "as more or less."

Edward J. Gay v. W. L. Larimore, 253.

25. In this suit against the succession of a defaulting tax collector and his sureties, a bill of exceptions is taken by defendants to the admission of a certified extract from the books of the State Auditor, showing the indebtedness of the deceased tax collector to the State, on the ground that it was not the best evidence, but a copy, and the absence of the original was not accounted for, and such original could not furnish proof of the statements contained in the copy.

The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office under his official seal.

State of Louisiana v. Succession of Masters et als., 268.

26. The defendant, having bound himself to give plaintiff within a

EVIDENCE—Continued.

certain time, a good and sufficient title to the sixteenth part of a lead mine, on the fulfillment of certain conditions by plaintiff, refused at the expiration of the delay to comply with his agreement. At the trial, the plaintiff offered in evidence the said agreement, which was rejected on the ground that it was not properly stamped, the court holding that the stamp necessary for the sale of real property should have been affixed instead of that for an agreement to sell. The court *a quo* erred. The document had on it the stamp required for such instruments.

Parol evidence to show that defendant had parted with his interest in said property, and that the stock company owning the same was insolvent, to the knowledge of the defendant, one of the stockholders thereof, was not improperly offered. Plaintiff was not seeking to establish his title to real estate, but to show defendant's inability to comply with the agreement to make a title. The evidence was not therefore subject to the rule requiring written proof of such title. It was certainly relevant so far as it tended to show plaintiff's compliance and defendant's non-compliance with their mutual obligations.

B. Burbank v. J. O. Pierce, 295.

27. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

28. Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. This court is not satisfied that he was employed by the year. Besides, on his being paid for the time he worked at the rate of \$1500 per annum, he took the money without objection.

Victor Tanner v. S. Cambon, 353.

29. On the trial of this case the defendant offered in evidence a written instrument to show the contract entered into between the parties, and proposed to prove by witnesses then present that the plaintiff had failed on his part to comply with the written agreement. The judge *a quo* erred in refusing to admit this evidence. It was incumbent upon the defendant, under the allegations of his answer, to prove the alleged failure of consideration, and he was entitled to the benefit of any legal evidence in his power to establish said allegations.

Baker B. Pegram v. John B. Cooper, 361.

30. Where, in a contest for the ownership of lands, proof was admitted as secondary evidence, the destruction of the primary evidence

EVIDENCE—Continued.

being shown, and the court *a qua* held that the objections went rather to the effect than to the admissibility, the ruling was correct.

The evidence, however, fails to identify sufficiently the land in dispute as the land embraced in the destroyed deed, but in the capacity of one of the heirs of John Ruth, who, it is admitted, entered the land at the Land Office at Monroe, John K. Ruth, or his succession, represented by the plaintiff, can maintain this petitory action against the defendants who are possessors without title.

The constructions made by Penn, one of the defendants, being partly on plaintiff's land and partly on defendant's, plaintiff can not keep them by paying defendant the costs of construction, pursuant to article 508 of the Revised Code, because the building is not entirely on plaintiff's soil. The defendant is not entitled to a judgment in reconvention for the value of his constructions, but must be allowed to remove that part of them erected by him and resting on the soil of the plaintiff.

John Gordon, Administrator, v. Fahrenberg & Penn, 366.

31. The plaintiff moved for a new trial in the court below on the ground that, during the recess of court, the jury was illegally and improperly influenced by the defendant and his accomplices to render a verdict in favor of said defendant, notwithstanding the judge had warned the jury that they were to hold no conversation with any person upon the merits of the case before them. On the trial of this motion, plaintiff attempted to prove his allegations by witnesses, which he was not permitted to do. The judge *a quo* erred in refusing to hear the testimony offered.

Patrick Higgins v. O. C. Haley, 368.

32. Where, on the trial, plaintiff introduced in support of the averment of his petition, that his domicile is in the parish of Orleans, and therefore that defendant's reconventional demand, being disconnected with plaintiff's claim, could not be entertained, and the defendant offered a witness to contradict this evidence on the question of domicile, and the plaintiff excepted thereto:

Held—That the court *a qua* erred in sustaining the exception. The question of the domicile of the plaintiff was an important one, upon which depended to some extent, the fate of the plea in reconvention. If the plaintiff in fact had his domicile in the parish of Ascension, as alleged by defendant, the plea of reconvention could be heard. The defendant had an interest in contesting the point with plaintiff, and had the right to introduce evidence in support of his position, and to rebut the proof offered by plaintiff.

John H. Stephenson v. James P. Broadwell, 387.

EVIDENCE—Continued.

33. Admitting that a debtor should have intended to defraud his creditors by the sale of his property, yet it is essential that the purchaser should be a party to the fraud in order that the sale be set aside. The declaration of the notary that the cash payment had been made in his presence, which declaration is not contradicted by any positive testimony, would outweigh the assertions of witnesses as to the purchaser's want of funds. It is a difficult matter for one man to tell what amount of money is or is not in his neighbor's pocket.

Joseph Billgery v. Jacob Schnell and Martin Joachim, 467.

34. In this suit on an open account, the plea of prescription is set up by the defense. On its face the account is prescribed, but it is alleged that before prescription accrued it was acknowledged. The evidence of this interruption is the testimony of the plaintiff, in which he refers to a letter of the agent of one of the defendants, J. M. Peterson, now deceased. This evidence was inadmissible to prove an interruption of prescription against the succession of J. M. Peterson. Besides, as to the letter above referred to, it is rather a negation than an acknowledgment of indebtedness.

Thomas Fawcett v. W. D. Peterson et als., 514.

35. The plaintiff in this case claims title to a certain piece of property, and alleges that the defendant is about to take forcible possession of said property, wherefore he prays that she be enjoined from doing so. The defendant admits that the property described in the petition was conveyed to plaintiff by a notarial act, but specially avers that, although the said act ostensibly shows title in plaintiff to the whole of said property, yet that she is in truth the owner of one-half of it, forming a distinct tenement, and pleads her right to the possession of it.

The defendant introduced in evidence the written act of transfer from plaintiff to herself, in which plaintiff declares: "Said house stands in my name, but I have no interest in the same. It belongs to my sister, Mary Duncan." The execution of this act was proved before a notary public and duly registered.

The written act was clearly admissible, and certain letters and parol evidence were also properly admitted to show that the plaintiff, for a length of time, during the absence of defendant in Europe, recognized her right to the property she claims, by acting as her agent and collecting and remitting to her moneys collected from time to time for the rent of that property; and also to define the property and describe its locality.

The written instrument in the nature of a counter letter, not denied by the plaintiff, nor in any manner impugned by him, is an effectual bar against the plaintiff's pretensions to ownership of the property.

Michael Duncan v. Mary Duncan, 532.

EVIDENCE—Continued.

36. It is objected that parol evidence should not have been received to prove the actual boundaries of Hollywood plantation, because, in the old records of the parish, in which Hollywood is referred to, the lands constituting that place are described, and to receive parol evidence to vary or contradict these records is prohibited. This is an error. The boundaries or limits of Hollywood might be changed at will by its owner, if he also owned the adjoining tracts of land, and the evidence received was to show that the boundaries of Hollywood plantation, as well known in 1868, 1869, were different from what they had been eighteen or twenty years before.

The act of sale shows that the Hollywood plantation was sold as a separate and distinct thing, as a field inclosed, with known and well defined limits, and the evidence was to establish said limits. That is certain, which can be made certain.

It is also objected that a partition of real estate can not be established by parol, and therefore, that testimony to show that the field had been actually divided and taken into the possession of the heirs, should not have been received. No valid force can be given to this objection.

There is written proof, by authentic acts, that the partition had been made. The testimony was to prove the fact of the actual division of the field and of the possession by one of the parties of his third share under said partition. The evidence was properly received.

It was further objected that parol evidence should not have been received to prove an *error* in the description of the lands sold to Fleming & Baldwin. If that be true, it would be unfortunate indeed, for there could hardly be any other mode to prove a wrong description.

This is not an attempt to prove, by parol, a sale of immovable property, nor to contradict a valid existing instrument, but to show that, by accident or negligence, the instrument in question has not been made the actual depository of the intention of the contracting parties. *Ex necessitate rei*, parole vidence should be received.

It is on this ground that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindered to those of fraud, and should be governed by the same rules. It is not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to the contract.

The evidence shows that there was an error in the description of the property in the deed to Fleming & Baldwin to the extent that it conflicts with Hollywood plantation. The other plaintiffs are con-

EVIDENCE—Continued.

cluded by their own renunciation and ratification on record, and which they can not now oppose.

Fleming & Baldwin v. Scott and Ida Watson. Matilda J. Bowie et als. v. The same. (Consolidated), 545.

37. Where the settlement alleged by the plaintiff to have taken place in relation to partnership business, was shown by an instrument signed by the plaintiff and defendant and attested by one witness, and when, on the trial of the cause, the defendant offered to prove by the witness that this instrument was only a statement of the account of the partnership; and that, at the time of signing the same, the plaintiff was, otherwise and besides, largely indebted to him—which indebtedness was acknowledged by the plaintiff;

Held—That the objection to the introduction of such evidence was properly sustained. The written act bound the parties and must speak for itself. The purpose for which the testimony was sought to be introduced seems to be vague. If the object of the defendant was to show that the succession of which plaintiff is the administratrix, owed him more on account of the partnership than the stated account shows, it was clearly inadmissible; if to show that the administratrix individually owed him, it was irrelevant.

Mrs. C. Pickens, Administratrix v. Thomas Friend, 585.

38. The prescription of five years is pleaded against the plaintiff who sues the administrator of one of the solidary obligors on a promissory note. The plaintiff having offered to prove that the prescription had been interrupted as to the deceased, Steen, by the testimony of the other maker of the note, Hardy, establishing Hardy's acknowledgment of the obligation before prescription had accrued, and having also offered other witnesses to the same effect, this was objected to on the ground that parol testimony was inadmissible to prove any acknowledgment of promise to interrupt the prescription of a debt against a person deceased;

Held—That the overruling of the objection by the court *a qua* was correct.

The evidence offered was not to prove the promise or acknowledgment of the deceased debtor Steen, but to prove the acknowledgment of Hardy, the living debtor, nor was it to prove the creation of a new debt, after the old one had been extinguished by prescription. The acknowledgment of Hardy, a debtor *in solido* with Steen, interrupted the prescription as to him or his estate.

Eugene Petetin v. Vincent Boagni, Administrator, 607.

39. There was in this case no dispute about title to real estate. The only question was whether plaintiff could establish by witnesses that a house built on a certain piece of ground had been paid for by him. This court thinks he could.

J. M. Pool v. L. Fontelieu, Public Administrator, 613.

EVIDENCE—Continued.

40. The form of certificate to the return of a commission to take testimony is not sacramental, and it is sufficient if it appear in the return, when and where and by what authority the deposition of the particular witness was taken.

An affidavit that the district judge was absent from the parish is sufficient under the law to authorize the parish judge to grant the order of the district judge for taking testimony.

Lambert B. Cain, Liquidator v. Solomon Loeb, 616.

41. The verbal admissions of the accused ought always to be received with great caution. Besides, it is a rule of evidence that the whole admission is to be taken together. In this case the witness only heard part of it. The evidence should have been rejected.

The State of Louisiana v. Eli Gilcrease, 622.

42. Defendant having testified that he had received account sales for all the cotton which had been sent to him by plaintiff, and that he had delivered the same to his attorneys who were then in court, was asked to produce them. This was objected to by defendant. The objection was correctly sustained under article 140 of the Code of Practice. Besides there are account sales in the record regarding five hundred and twenty-nine bales of cotton, which is all the cotton received by the defendant from the plaintiff.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff, et al., 651.

43. The plaintiff's allegations charge the defendant with bad faith and fraud. Under the pleadings these were allegations which it devolved upon her to establish, and if she had not done so, perhaps the defendant might have contented himself with leaving the case where she did, but there is no reason why, if he chose, he should not be allowed to show by positive testimony that such grave charges against his honesty and honor were without foundation. The judge *a quo* did not err in permitting him to do so, and overruling plaintiff's objection to the introduction of such testimony.

Ibid.

44. On the trial, plaintiff's counsel moved the court to continue the case to enable her to procure her testimony, or that they might be permitted to send for her, she being only a short distance from the courthouse. The judge properly refused and ordered them to proceed. Plaintiff had not been subpoenaed as a witness, and there was no process by which her attendance could have been compelled. If she had intended to be heard in her own behalf, she should have been present to testify when the time came.

Ibid.

45. The testimony offered by plaintiff to show that other persons than Pargoud had furnished her with supplies and made improvements

EVIDENCE—Continued.

on her plantation, was properly rejected as irrelevant. It did not follow that the defendant had not done the same for her. *Ibid.*

46. The authorization to the President of the Claiborne Manufacturing Company to confess judgment was a matter of fact, and this fact it was competent for the defendant to establish by any sufficient evidence. The mere circumstance that the authority was not placed of record in the books of the company does not destroy the fact that it was given, and the party in whose favor the authority was to act could not be deprived of his rights, simply because the officers of the company were negligent in the performance of what was perhaps their duty.

Thomas B. Kilgore v. Thomas N. Willis et al., 665.

47. The fact of a husband being the bearer of an act which he presented as his wife's power of attorney to himself, and acting as her attorney in fact under it, might be shown, in order to establish his authorization to her, after it was distinctly proved that the wife signed the act.

Succession of Mary A. Gee. Opposition of heirs to the application of Public Administrator for administration, 666.

48. The judge *a quo* erred in not permitting it to be proved that an account which had been settled by a note was incorrect. Notwithstanding the note, the party interested had the right to show that the account upon which it rested was not right.

R. C. & M. Oglesby v. M. P. Renwick & Co., 668.

49. The judge *a quo* did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

E. D. Duckworth, individually and as administrator, v. Isaac B. Payne et al., 683.

50. Title does not come into view when the question is purely one involving the right of possession.

Chaffe, Shea & Loye v. George B. Abercrombie, 685.

51. The judge *a quo* erred when he permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

State of Louisiana v. S. W. Edgar, 726.

52. Authority to correct the errors of assessment complained of in this case is solely confided to the State Board of Assessors in the city of New Orleans and to the Auditor. It was therefore useless for the court *a quo* to hear testimony upon a point on which it was without authority to decide, to wit: the errors of the assessment, and the testimony offered was properly rejected. Besides, it was

EVIDENCE—Continued.

not alleged in the answer that the defendant sought to correct the errors complained of by making application to the State Board of Assessors according to law.

The constitutionality of that provision, making the decision of said board of assessors final as to "the valuations in the assessment roll," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised. *State of Louisiana v. Widow J. C. de St. Romes*, 753.

SEE ADMINISTRATOR, No. 12—*Succession of E. Carlon*, 329.

SEE WITNESS, No. 1—*Mrs. LeBlanc v. Succession of Massieu*, 332.

SEE PARTITION, No. 2, 3, 4, 5, 6—*Gusman v. Hearsey*, 251.

SEE SEIZURES AND SALES, No. 9—*Johnson v. Dunbar*, 188.

SEE SUBROGATION, No. 2—*Durac v. Widow Ferrari et al.*, 114.

SEE GARNISHMENT, No. 2—*James Foulhouse v. Myra Clark Gaines*, 84.

SEE CRIMINAL LAW, 2, 3, 4, 5, 6, 7, 8—*State v. Didio Baptiste and Martini*, 134.

SEE CRIMINAL LAW, No. 16—*State v. Monie & Fontaine*, 513.

SEE CRIMINAL LAW, No. 13, 14—*State v. Shonhausen*, 421.

SEE CRIMINAL LAW, No. 15—*State v. Tenney*, 460.

SEE CONTRACT, No. 7—*Hern v. Gouldy, et als.*, 371.

SEE OBLIGATION, No. 1—*George M. Bailey v. David Denny*, 255.

SEE OBLIGATIONS, No. 6—*Louisa French v. Bach et al.*, 731.

SEE HUSBAND AND WIFE, No. 7—*Eliza Rainey v. Fanny Asher et al.*, 262.

SEE HUSBAND AND WIFE, No. 12—*Mrs. Feltus v. Blanchin & Geraud*, 401.

SEE LEASE, No. 10—*Grayson v. Buie*, 637.

SEE CORPORATIONS, No. 8—*Donnelly v. St. John's Protestant Episcopal Church*, 733.

EXECUTOR AND TUTOR.

SEE ADMINISTRATOR.

EVICITION.

SEE OBLIGATIONS AND LIABILITIES, No. 4—*Milton Wilson v. Benjamin et als.*, 587.

GARNISHMENT AND GARNISHEES.

1. A rule taken by plaintiff on the garnishee in this case to show cause why he should not pay a certain judgment against defendant, because he had in his possession, notwithstanding his negative answer which was alleged to be false, property, rights and money of defendant to pay said judgment, and the garnishee on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in

GARNISHMENT AND GARNISHEES—Continued.

vacation. The exception was overruled, and the garnishee filed an answer in which he prayed for a jury. The exception should have been maintained; the issues presented were such as should have been submitted, if desired, to a jury.

A. C. Denouvion v. Rebecca A. McNight—W. C. Harrison, Garnishee, 74.

2. The plaintiff, a judgment creditor of defendant, Mrs. Gaines, issued execution and instituted garnishment process against the city of New Orleans, the latter being a judgment debtor of Mrs. Gaines by virtue of a judgment and decree of the United States Circuit Court.

The plaintiff moved that the city of New Orleans and other garnishees show cause why the said city of New Orleans should not be condemned and ordered to pay to the sheriff the amount of plaintiff's judgment and *feri facias*, on the ground that by their answers it was shown that the city had sufficient funds to pay.

On the trial, a bill of exceptions was taken by the plaintiff to the ruling of the court sustaining objections to the introduction in evidence by plaintiff of a certified copy of the *feri facias* issued in the case of Mrs. Gaines v. The City of New Orleans in the United States Circuit Court, together with the returns on the *feri facias* and to all evidence whatever in support of the averments made in the rule.

The objections were, that plaintiff could not proceed summarily by rule against said garnishees; that they were entitled to trial by jury; that the granting of the order asked for would interfere with the exclusive jurisdiction of the United States Circuit Court and bring the State court in conflict with it.

The court *a qua* erred. If entitled to a jury, the garnishee, city of New Orleans, went into the trial without praying for one. She was a mere stakeholder in this case without interest on her part as to whom payment should be made.

The evidence erroneously rejected was intended to show that the *feri facias* held by the United States Marshal was returned into court unsatisfied in whole; that no property was found to seize, and that nothing was made on the writ. The Circuit Court of the United States had exercised its authority in the rendition of the judgment. The judgment was the property of Mrs. Gaines, and like any other property she owned, was liable to seizure by her judgment creditors. It is impossible therefore to perceive how a conflict of jurisdiction could arise from the proceedings on garnishment.

James Foulhouse v. Mira Olark Gaines, 84.

3. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

GARNISHMENT AND GARNISHEES—Continued.

In this case of *Halpin v. Barringer*, judgment was rendered for plaintiff, and a *feri facias* having issued, Woelper was made garnishee. He answered that he had certain funds deposited in his hands, in a certain suit. Upon this answer judgment was rendered against him. This judgment is wrong.

The judgment in the case in which Woelper was made garnishee, was against Barringer individually, in so far as the record discloses. The money in the hands of the garnishee belonged to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him, and the payment of such a judgment would not release the garnishee.

Patrick Halpin v. John L. Barringer—W. Woelper, Garnishee, 170.

4. That the Crescent City Live Stock Landing and Slaughterhouse Company, garnishee, being an incorporated company, is subject only to the jurisdiction of the Superior District Court, and can not be brought into the Fifth District Court, may be true as regards original process, but it does not hold when the company is made garnishee. The court which rendered the judgment out of which the garnishment process springs, necessarily has jurisdiction over the party made garnishee.

The objection that Durbridge, the defendant, having sued the garnishee for the same subject matter in the Sixth District Court, no other court could obtain jurisdiction by service of citation or garnishment process, can not be maintained. The plaintiff is not bound by any proceedings to which he was not a party, and as he was not a party to the suit referred to, the decision in that case, whatever it may be, can not affect his rights.

Job Smith v. William Durbridge. Crescent City Live Stock Landing and Slaughterhouse Company, Garnishee, 531.

5. Cooper the garnishee in this case answered the interrogatories, acknowledging his indebtedness to Fuller, the defendant, and some time afterwards he filed another set of answers the effect of which is to release himself from any judgment in this suit. This can not be allowed. The object of such interrogatories is to elicit the truth, and ample opportunity is afforded to the person interrogated to answer clearly, fully and unequivocally. If he does not properly avail himself of such opportunity, it is his own fault.

A. B. & N. B. Thomas v. Henry Fuller. Jas. C. Cooper, Garnishee, 625.

SEE SUCCESSION, No. 1—*Mumford v. Mrs. Bowman & husband, 413.*

SEE SUCCESSION, No. 2—*Netter v. Herman and Levy, 458.*

SEE WILLS AND TESTAMENTS, No. 5—*Heirs of C. A. Johnson v. B. Johnson, 570.*

SEE JURISDICTION, No. 20—*Tessier v. Littell, 602.*

SEE ACTION, No. 11—*Daniel v. Ivy et als., 639.*

SEE SUBROGATION, No. 3, 4—*Dockham, Wife v. City of New Orleans, 302.*

SEE INSOLVENCY, No. 1—*Camutz v. Bank of Louisiana, 354.*

SEE INSURANCE, No. 8—*Malthus v. Crescent City Mutual Insurance Company, 386.*

HOMESTEAD.

1. Where the answer is that the mortgage was executed upon the land in favor of defendants before the plaintiff had acquired a homestead right upon it—that is, that Fuqua, while a resident of the parish of Terrebonne, and before he went to reside on the Oak Point plantation, in the parish of Madison, mortgaged that plantation to the defendants;

Held—That the law which conferred the homestead right existing at the time the mortgage was granted, the defendants accepted the mortgage subject to the contingency that might arise in the future, rendering it necessary for the mortgageor to avail himself of the benefit of the homestead law.

N. D. Fuqua v. John Chaffe & Bro., 148.

2. The plaintiff is not entitled to claim the homestead he pretends to be entitled to, out of the property seized, which is his undivided sixth interest in a tract of land containing some five hundred acres, which he held in common with other heirs. What is seized is not susceptible of being a homestead; it is only plaintiff's share in the land; it is an incorporeal thing; and what is incorporeal can not be the object of the operation of the homestead law.

Frank D. Henderson v. Joseph Hoy and Sheriff, 156.

3. A contest, to be paid by preference, out of the proceeds of this succession, arose in the court below, under the homestead law, between the vendor of a lot of furniture, the lessor of a house and lot furnished with said furniture, and the tutor of a minor child left in necessitous circumstances. In this court the contest is limited to the homestead claim, and the party asserting the vendor's privilege.

The claim of the minor must prevail. The homestead privilege was given the highest rank with one exception, that of the vendor, and for expenses in selling the property. As there are two privileges of the vendor, that on immovables, which enjoys the highest rank, and that on movables, which holds an inferior rank, the exception can not apply to both, but only to the one holding the first rank—that on immovables. Hence the homestead privilege must prevail over that of the vendor of movables, which itself is inferior to that of the lessor. This construction obviates all difficulty in construing the several articles of the Code bearing on the subject.

Succession of William Cooley—On Opposition to Tableau of Distribution, 166.

4. The judge *a quo* erred in allowing the widow, testamentary executrix in this succession, the homestead of \$1000 in addition to two sums: \$215, value of furniture, and \$140, rent, received by her. Whether the furniture belonged to the widow or not, its value,

HOMESTEAD—Continued.

according to the law, must be deducted from the homestead allowance. The rent also should have been deducted.

Succession of Tobias Drum—On Opposition of C. F. Berens, 539.

5. In the name of Joseph Mallon and his wife an injunction was taken to stop the sale of a plantation belonging to Joseph Mallon, on the grounds that they were entitled to a homestead. The wife made the affidavit and executed the bond, having been authorized to do so by the judge, on proof that the husband was absent.

The right to the benefit of the homestead act is not established by the facts of this case. But the husband, who alone could have asserted the right, if it existed, is not before the court, and nothing therefore can be decided to affect his rights. The wife has asserted no right personal to herself in this suit, and she has no right to represent her husband in the matter, nor can she bind him by her acts.

Joseph Mallon and Wife v. Frederick L. Gates, 610.

6. The plaintiff, in necessitous circumstances, can not be excluded from the benefit of the homestead law, when it is shown that the entire property of herself and the minor is less than \$1000.

It being proved that the minor owns \$216 95, and she, the widow, \$50, she is entitled to the usufruct of \$733 05 during her widowhood. Afterwards this sum is to vest in and belong to the minor heir of the deceased.

Whether or not the tutor of the minor has applied for the homestead is immaterial. The plaintiff, who has an interest, has made the application. The destination of the money, after the expiration of the usufruct, is fixed by law, regardless of the question whether the tutor of the minor has made a formal application for the homestead or not.

As the plaintiff is not the mother of the minor, she is not dispensed by article 560 of the Revised Code from giving security for the usufruct of the money.

Arsene Corner v. Cesaire Bourg, 615.

7. The exemption of one hundred and sixty acres of land with the improvements, together with the work stock, supplies, etc., mentioned in the homestead act of 1852, shows that the intention of the law was to preserve a homestead for a farmer, in order that his family might be supported and his occupation might not be broken up. It has no application to a case like this, where there is merely a house and lot occupied as a residence by an attorney at law.

John L. Hargrove v. A. Flournoy, Sheriff et al., 645.

HUSBAND AND WIFE.

1. Where the objection was that the plaintiff alleged that the indebtedness of the defendant arose from family and plantation supplies furnished in 1870 and 1871, that the first item appearing on the

HUSBAND AND WIFE—Continued.

plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first of January 1870, was not, and did not purport to be for such supplies, and was too general and indefinite to admit of proof;

Held—That the objection was well taken and that the testimony offered should have been rejected.

The husband of defendant was the manager of the *Verona* plantation belonging to her, prior to her being separated from him by judicial decree in October, 1869. During that year he received supplies from the plaintiff and the sum of \$3970 charged, as before stated, as the first item on the account sued upon, is inferred to be, for the most part, for the supplies of 1869. It is in proof that for the period of 1870 and 1871, for which the supplies are charged, she had always refused to supply the laborers on her place, which was leased out to them, and had neither authorized her husband nor any other person to contract for supplies. The plaintiff can only have judgment for \$303 18, as the amount of articles established as furnished to defendant and which went to her individual use.

Joseph Moore v. Mrs. Inez Routh Gordon, 167.

2. The creditor of a succession can call upon the courts of competent jurisdiction to see that the administration thereof be properly conducted.

This court sees no warrant in the law of Louisiana for answering in the affirmative the following questions: If a wife sue her husband for a separation from bed and board and a dissolution of the community which existed between them, and judgment is pronounced in her favor, dissolving the community; and if, after living apart for several years, and no judgment of divorce has been pronounced between them, they become reconciled, does reconciliation wipe out the judgment of separation and replace the parties in the same position they were in before it was rendered? Does property acquired by either of the spouses between the time the judgment was rendered and the reconciliation fall into the community?

There is no article in the Louisiana Code which corresponds with the article 1451 of the Code Napoleon. It was the law of France, even before the adoption of that code, that a community which had been dissolved might be re-established. Here there is no such law. The administratrix, in this case, has not filed an account of her administration within a twelvemonth. The law makes this her duty, for the non-performance of which, the penalty is dismissal from office.

Mrs. Anne Ford v. Mrs. Anne Kittredge, Administratrix, 190.

3. The debts of the community during its existence are the debts of

HUSBAND AND WIFE—Continued.

the husband. The property of the community is liable for the payment of them. Even more, the community property may be taken to pay debts of the husband contracted before the marriage. On the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts, is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal.

Hence the community property justly comes under his control until the debts are paid. Before their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain until, by the result of the final discharge of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse.

O. K. Hawley, Public Administrator and his successor J. M. Wells v. Crescent City Bank, et als. 230.

4. If the surviving husband has the right to control the community assets, and to administer them after his wife's death, so as to make *bona fide* settlements of its debts, he has equally the right to waive or omit specific defenses to suits and indisputable claims. *Ibid.*
5. If, through fraud by a surviving husband in community to injure the heirs of the wife, he should sell or otherwise dispose of the community property, it would seem that they would have a remedy by the provisions of art. 2404 of the Civil Code. *Ibid.*
6. In this case the husband had by law the usufruct of the wife's half of the community property, consisting of the undivided half of the lands seized by the judgment creditors, no partition of the community property having been made. Nevertheless, without opposition on the part of the surviving husband, the public administrator came forth and administered on what he styled the estate of the deceased wife and enjoined the sale of the community property seized by judgment creditors of the community, and which is subjected to the payment of their judgment. This proceeding is irregular and illegal, and the injunction must be dissolved with damages. *Ibid.*
7. Plaintiff borrowed money to pay two notes which were secured by mortgaged upon the property she claims as her own; and to prevent the sale of which she enjoins the sheriff, and the two notes were paid with the proceeds of this loan. It is not, therefore, true, as she alleges, that the money was borrowed and used for the benefit of her husband. This is established by the testimony of

HUSBAND AND WIFE—Continued.

the notary who drew the act of mortgage and of the broker through whom the money was borrowed. It was a fact necessary to be established. The objection to this evidence was properly overruled.

The acts of mortgage under which plaintiff borrowed the money upon the note, the collection of which she has enjoined, and which show her antecedent indebtedness, relate that she had been specially authorized to borrow the money by the judge of the Third District Court of the parish of Orleans. Her objection to the introduction of these acts was not well founded. They were signed by her and were, therefore, her own acts and declarations. Admitting that they could be disproved by parol, the burden of doing so rested upon her.

Mrs. Ann Eliza Rainey, wife of James H. Massey v. Fanny Asher and Sheriff Harper, 262.

8. The objection that the judge of the Third District Court of the parish of Orleans, where she resides, had no power to authorize her to make the loan, is without solid foundation.

The judge of the Third District Court is as much a district judge as any other district judge in the parish. The law says that a married woman who desires to borrow money and to mortgage her own property to secure the same, must be authorized so to do by the judge of the district or parish in which she resides. As the judge of the Third District Court, although having a limited jurisdiction for the convenience of business, is a district judge for the parish of Orleans, it follows that plaintiff was authorized by the judge of her district in the sense of the law. *Ibid.*

9. It can not be contested that a married woman has a right to compromise a law suit pending against herself; and transactions have, between the interested parties, a force equal to the authority of the things adjudged.

It is difficult to imagine, in this instance, how it can be pretended that the money loaned by Sollibellos, the defendant in injunction, for enabling Mrs. Barron to effect a compromise about a suit brought against her, did not inure to her benefit, nor can she be listened to when saying that the debt on which she has been sued, was the debt of her husband, when the contrary is proved by the compromise thus agreed to with a view of putting an end to that law suit.

The interventions were improperly allowed in an injunction suit which was to prevent a sale. If the intervenors have privileges, they can only enforce them upon the proceeds of the sale of the property in the hands of the sheriff; and if any part of the prop-

HUSBAND AND WIFE—Continued.

erty seized is claimed to belong to some one else than the debtor who enjoined, that claimant's remedy is by injunction obtained according to law. *Maria L. Barron v. J. F. Sollibellos*, 289.

10. The wife can, with the consent of her husband, sell her separate property and give the proceeds to her husband, who then becomes her debtor. Having the authority to sell and having made a sale in due form, the object for which it was made by the wife, to raise money for her husband, does not make it any the less a sale as to third persons without knowledge. The public knows that a wife has the right to sell her property if duly authorized, and that her husband may receive and use the proceeds, and if there is nothing to create suspicion, or put the capitalist on his guard, he may safely discount a mortgage note given by a purchaser to a married woman as a part of the price of her property regularly sold by her. *Mrs. M. H. Walker, Wife, etc. v. F. Limongy et al.*, 324.
11. Art. 2446 of the Revised Civil Code provides that a contract of sale between husband and wife can take place only in the three cases which it mentions.

In this instance, the husband and wife had no right to contract in the manner attempted, and the mortgage sought to be enforced by executory process is utterly void.

The defendant erroneously contends that, as a third holder before the mortgage paper, resulting from this illegal contract, became due, he is not affected by said nullity.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper governed by the rule invoked by defendant.

F. S. Garner, Administrator v. Watson M. Gay and Sheriff, 375.

12. The mortgage note, which is the object of this suit, was granted by plaintiff in injunction under the authorization of the judge, pursuant to the act of 1855. She therefore occupies no better position than a *femme sole*. If there was a want of consideration, it devolved on her to prove it.
- The plaintiff excepted to the ruling of the court refusing to allow her to prove that her plantation was cultivated by her husband and his brothers during the years 1868 and 1869, and therefore the supplies furnished by the defendants did not inure to her benefit. The court *a qua* did not err in refusing the evidence, because it would have contradicted her judicial admissions in the petition for injunction. *Mrs. Mary E. Feltus v. Blanchin & Giraud*, 401.

HUSBAND AND WIFE—Continued.

13. Plaintiff applied for authority to borrow money to a judge of competent jurisdiction, and was by him authorized to borrow it. The act of mortgage was not consummated until her authority to borrow had been obtained. If any force, threats, or improper influences were brought to bear upon her by her husband, it does not appear that the defendant, who loaned the money upon the faith of the authorization of the judge and the security of the mortgage was, in any manner, a party to it. The plaintiff's injunction to prevent the sale of her property must be dissolved.

Mrs. Louisa Reich, wife of Rhodor v. Hyacinthe Rosselin et als., 418.

14. It appears from the record that the property claimed by plaintiff was seized and sold at the suit of Marie Jeanne Piseros and bought by Chevalley, one of the defendants. It was originally purchased in the name of plaintiff, but this was done during her marriage, as her husband appears as a party to the act authorizing the purchase. The property so purchased must, in the absence of anything being shown to the contrary, be considered community property, and liable for the community debts.

It is moreover shown that the wife was a party to an act of mortgage by her husband of this same property in favor of Marie Jeanne Piseros, to secure the payment of the purchase price of the same, and fully renounced her rights on the property.

Caroline Richardson, wife of A. Piseros v. E. R. Chevalley et als., 551.

15. It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

Succession of Alexander McDonald, 590.

16. The law expressly allowed defendant, J. A. Chalaron, to make a giving in payment to his wife, and it was his duty to cause the registry of her mortgage to be made. This settlement with his wife can be corrected by his creditors, if found to be erroneous and to their prejudice. If the defendant believed the suits in which he confessed judgment were just demands against him, it was not only his privilege, but his duty to admit their correctness or confess judgment. This is no ground for attachment.

J. W. Wilson, Administrator v. J. A. Chalaron et al., 641.

17. The plaintiff in injunction, Mrs. Murphy, sets up, among other grounds, that she has an interest and ownership in the lots ordered to be seized and sold, superior to the mortgage of Hoss, the plaintiff in execution—which mortgage was granted to Hoss by her husband, now deceased, to guarantee the payment of two

HUSBAND AND WIFE—Continued.

promissory notes, and which she alleges to be a fraud upon her rights and void. She further alleges that she has a claim against the succession of her husband for rents and revenues which were under his control and administration, and which were received and converted by him to his own use; that being a party in interest, she was entitled to notice in the executory proceeding, which was not given to her, but only to McWilliams, the executor of her husband. She further avers nullity of the proceeding on the ground of want of jurisdiction in the district court that rendered the order of seizure—the succession being now under administration in the parish court, and was so at the time the order of seizure was granted;

Held—That the grounds urged by the plaintiff in injunction do not authorize the injunction. The district court had jurisdiction to issue the executory process, and the rights asserted by the wife are not such as to justify the injoining of the sale of the husband's property, or property of the community. If she has real rights upon such property, they can be enforced upon the proceeds. If her rights are merely usufructuary, they will not be affected by the sale injoined, as it is only the naked ownership of the property that is sought to be sold.

Jacob Hoss v. J. G. McWilliams, Executor, 643.

18. The fact of a husband being the bearer of an act which he presented as his wife's power of attorney to himself, and acting as her attorney in fact under it, might be shown, in order to establish his authorization to her, after it was distinctly proved that the wife signed the act.

Succession of Mary A. Gee, 666.

19. The defendant, a married woman, is sued on three mortgage promissory notes drawn by her. It being in evidence that the defendant executed said mortgage on her separate property in favor of a firm of which her husband was a partner, to secure the payment of a certain sum of money which had always appeared in the books of the firm as the debt of her husband, who, to the knowledge of the firm and without their objection, was in the habit of drawing largely in excess of the amount he was authorized by the articles of partnership to withdraw annually, and which sum invested by her in the mortgaged property, sought to be seized, was given to her at a time when he was indebted to her in a greater amount for the restitution of paraphernal funds;

Held—That said mortgaged property can not be seized by the hold-

HUSBAND AND WIFE—Continued.

ers of the notes, on the ground that she can not bind herself for her husband's debts.

Ferdinand Koechlin v. Mrs. Louisa Thontke, wife of F. J. Lorber, 737.

SEE DONATIONS, No. 1, 2, 3—*Succession of Thomas Hale*, 195.

SEE EVIDENCE, No. 19—*Baker & Thompson v. Mrs. Pagaud*, 220.

SEE INSURANCE No. 5, 6, 7—*Succession of A. Constant Hearing*, 326.

SEE COMPROMISE, No. 2—*Archinard, Widow v. Louis Boyce*, 292.

SEE MORTGAGE, No. 6—*Succession of Cordeviollé v. Dawson*, 534.

SEE AGENT AND PRINCIPAL, No. 3—*Peter James v. Mrs. Lewis and Husband*, 664.

SEE INJUNCTION, No. 19—*Julia Lewis v. Winston et als.*, 707.

SEE BILLS AND PROMISSORY NOTES, No. 21—*Brooks v. Mrs. Stewart and husband*, 714.

ILLEGITIMATE CHILDREN.

SEE ADMINISTRATOR, No. 11—*Drouet v. Drouet*, 323.

INJUNCTION.

1. The material facts in this case are as follows: The plaintiffs were, in 1871 and 1872, the commission merchants and factors of Wilkinson, who owed them in April, 1872, about \$18,000, evidenced by two notes secured by mortgage, at which date their payment was extended to first of February, 1873. A pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873, to the amount of \$12,000, the planter obligating himself to ship the crop of that year and each subsequent year, if necessary, to pay the said sums with interest, and all commissions, expenses, etc. In December, 1872, the shipment in question was made of hogsheads of sugar and barrels of molasses, marked with the initials of plaintiffs, but without any special instructions from Wilkinson. The plaintiffs received the bill of lading early on the morning of the day of its arrival. A few hours afterwards, on the same day, the sheriff of the parish of Orleans, with a *fi. fa.* from the parish of Plaquemines, in the suit of D. & J. D. Edwards v. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon the plaintiffs, claiming the custody and control of the said property to the exclusion of Wilkinson's creditors, and as exempt from seizure by them, took an injunction.

The court thinks that the property belonged to Wilkinson, the shipper, and that his creditors might seize, subject to the rights of the consignees to be settled contradictorily with the seizing creditors,

INJUNCTION—Continued.

inasmuch as the consignees were the agents of the shipper, and their constructive possession under the bill of lading did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under the *fi. fa.*, or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances.

The injunction was not the remedy to which the plaintiffs were entitled. The sheriff should have proceeded with the sale, leaving the plaintiffs and defendants to settle their respective rights to the proceeds.

Chaffraiz & Agar v. W. P. Harper, Sheriff, and D. & J. D. Edwards, 22.

2. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does not come under the exceptions contained in the 494th article of the Code of Practice.

James McCracken, Administrator v. James Madison Wells, 31.

3. This is an injunction suit, in which the plaintiff alleges that the judgment under which execution issued is a nullity, on the ground that there is no legal corporation plaintiff therein, or owner thereof, such as the Accommodation Bank.

There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in the original suit. Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence it is *res judicata*.

Francis C. Mahan v. Accommodation Bank et als., 34.

4. Where the ground for the injunction restraining the executory proceedings of the defendant was, that there is a deficiency in the measure of the property bought by the plaintiff from the defendant—the price of which is secured by the mortgage sought to be enforced—and that, on account of this deficiency, there should be a diminution of the price;

Held—That the sale being *per aversionem*—reference to the plan and to the streets bounding the squares controlling the expressions in regard to the measurement of the ground—the alleged deficiency can not avail the plaintiff in injunction.

Albert E. Whitney, George W. Whitney, Administrator v. Bertrand Saloy, 40.

5. The plaintiff in injunction not having set up, in defense to the suit against him, as he might have done, that he was discharged in bankruptcy from all his debts, can not make it a cause for an injunction.

P. Gallaher v. J. T. Michel et als., 41.

INJUNCTION—Continued.

6. When an injunction was dissolved upon the face of the papers, no statement of facts, evidence or assignment of error is necessary to enable this court to pass on the correctness of the said ruling. This court has only to look into the allegations or grounds for the injunction to determine whether or not they are sufficient to authorize the writ; but this can not be done on a motion to dismiss.
A. W. Walker v. E. Villavaso, 42.
7. Where, after a first injunction, which was dissolved, the sheriff was simply proceeding with a sale long after the seizure had been made, and where, on a second injunction being taken, it was alleged as a ground for said injunction that no demand of payment and no notice of seizure were ever served according to law;
Held—That these objections, if there be cause for them, should have been made on the first injunction. *Ibid.*
8. Article 666 C. P. and the two preceding articles must all be construed together, so as to give effect to each.
Where the ground for injunction was that the advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure;
Held—That when a plantation and its fixtures are to be sold under a mortgage, as in this case, the sale must be made at the seat of justice unless the debtor require it to be made on the plantation.
The advertisement in this case describes the articles, called movables by plaintiff, as constituting a part of the buildings and improvements on the plantation, and with one or two trifling exceptions, they are what the law subjects to the mortgage existing on the plantation; but, if they were movables, it would not be a ground for injoining the sale of the property subject to the mortgage, and besides, the plaintiff has not requested the sale to be made on the plantation. *Ibid.*
9. An error in the calculation of interest on the judgment rendered and sought to be executed, is no ground for an injunction. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *fiery facias* be issued for too large a sum. *Ibid.*
10. If the description of property to be sold is insufficient, the owner thereof can not be injured, because there will be no sale. Therefore this is no ground for an injunction by the defendant in execution. *Frank D. Henderson v. Joseph Hoy and Sheriff*, 156.
11. The plaintiff, a mere mortgagee, had no right to enjoin the sale of the plantation of Bovard under executions in favor of a number

INJUNCTION—Continued.

of creditors of said Bovard, on the grounds substantially that the sheriff was proceeding irregularly and illegally in making said sale. If the sale be null for illegality, it can not affect his rights; and if the sale be valid, his remedy would be by third opposition to claim the proceeds of the sale.

William G. James v. John E. Breauz, Sheriff, et als., 245.

12. The plaintiff attempts to restrain by injunction the defendants, his daughters who are his judgment creditors, from selling under execution his dwelling house and other buildings which he erected on their lot, separately from the lot.

As the plaintiff could transfer whatever right or ownership he may have to the buildings standing on the defendants' property, it is not seen why a forced sale thereof may not be made by the defendants, his judgment creditors.

Leonville Augustin v. Mrs. H. Dours et als, 261.

13. The order of the court *a qua* dissolving the injunction in this case is one which, in the opinion of this court, might work an irreparable injury to the relator; therefore the relator had a right to appeal from it. The judge below erred in dissolving the injunction.

State of Louisiana ex rel. John T. Hayes v. The City of New Orleans, 304.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thomas J. Emerson and George F. Porter, 351.

16. A party can not be enjoined from prosecuting suits for claims, whether well founded or not. On the defense the parties can be heard and their rights adjusted. The intimation that a party fears he may not obtain justice before a particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction.

INJUNCTION—Continued.

The judge *a quo* dismissed the rule, and on the trial of the merits dissolved the injunction, with \$100 for counsel fees. As no evidence was admitted on the trial of the motion, in reference to any damages, and the motion should have been sustained, no damages can be allowed. This is not the class of cases in which damages may be given without special proof. The plaintiffs and their securities are liable on their injunction bond.

Butchers' Benevolent Association v. R. King Cutler, 500.

17. On the trial of a rule, contradictorily with the parties in interest, to show cause why a writ of injunction should not be granted to restrain a sale as prayed for by relator, the judge *a quo* rendered an interlocutory order refusing the injunction and declined to grant an appeal from said order. In this the judge erred.

The order complained of was certainly an interlocutory order working the relator an irreparable injury. His property was about to be sold for the debt of another; he was entitled to an injunction to protect his right of property, having made affidavit and tendered bond according to law. These sworn averments must be taken as true for the purposes of this inquiry. The relator has the right to have the judgment revised. Upon examining the evidence this court may find that the judge erred, and that an injunction should issue.

The right of appeal is a constitutional right, and it should be jealously guarded by this court.

State ex rel. Van Norden v. The Judge of the Superior District Court, 550.

18. The judge *a quo* did not err in refusing to allow the plaintiff to take a judgment by default on the supplemental petition which had been filed by her, in which she set forth additional reasons why an injunction should issue. The allegations were not sworn to. Admitting that a supplemental petition to an application for an injunction is permissible, which it is not necessary to determine in this instance, still the truth of the allegations in the supplemental petition should be sworn to.

Before proceeding to trial, plaintiff moved that the rule taken upon her by Pargoud, to prove the truth of her allegations in a summary manner, should be considered as an answer. The judge did not err in refusing the motion. Defendant had the right to call upon the plaintiff to verify the truth of her allegations without an answer.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff, et al., 651.

19. Where the wife alleged that she was separated in property from her husband, that the property seized and of which she was in pos-

INJUNCTION—Continued.

session at the time belonged to her, and prayed for an injunction to prevent the sale of said property to pay her husband's debts, the exception that plaintiff had failed to set forth the nature of her title can not be sustained. This is not a petitory action, although the title to property be incidentally involved.

The affidavit of the plaintiff in injunction, that the facts and allegations set forth are true, is sufficient. It was not necessary to state that they were all true. The importance of the omission of the word *all* in the affidavit can not be seen.

The objection that the husband has not authorized his wife to bring this suit was properly overruled. It is alleged in the petition that she is authorized by her husband, and this is not specially denied. But the injunction bond is signed by the husband. That is sufficient proof that he has authorized the institution of this suit.

Julia A. Lewis v. Winston, Morrison & Co. et als. 707.

20. The objection that there was not sufficient evidence to authorize the order of executory process can not be examined on an injunction. The remedy was by appeal.

The City of Shreveport v. A. Flournoy, Sheriff, et al., 709.

SEE MANDAMUS, No. 1—*Citizens' Bank of Louisiana v. A. Dubuclet*, 91.

SEE SEIZURES AND SALES, No. 6, 7—*Chaffraix & Agar v. Packard et als.*, 172.

SEE BONDS, No. 14—*Levin et als. v. Lacey*, 270.

SEE OFFICES AND OFFICERS, No. 6—*Cramer v. Brown*, 272.

SEE BONDS, No. 16—*Pottier v. Grant et al.*, 283.

SEE BONDS, No. 19—*State v. Clinton and Dubuclet*, 346.

SEE NEW ORLEANS, No. 3—*Kendig & Co. v. City of New Orleans*, 357.

SEE DAMAGES, No. 4—*Cohen & Wilson v. Avery et als.*, 359.

SEE PARTITION, No. 8—*Lyons v. Dobbins*, 580.

SEE APPEAL, No. 26—*Simon v. Walker*, 603.

SEE SEIZURES AND SALES, No. 18—*Richardson v. Dinkgrave*, 632.

SEE HUSBAND AND WIFE, No. 17—*Hoss v. McWilliams*, 643.

INSOLVENCY OR BANKRUPTCY.

1. The plaintiff having obtained judgment against the Bank of Louisiana, took garnishment process against Generes and sought to make him liable. Generes excepts on several grounds, and among others that the plaintiff made proof before a register of the United States District Court of the judgment obtained by him against the said bank which had been declared bankrupt, and filed his proof with the assignees on July 3, 1871, thereby making himself a party to the bankrupt proceedings and abandoning all other rights, liens

INSOLVENCY OR BANKRUPTCY.

and privileges against the bankrupt, except those reserved by said proof; that by the order of the United States District Court, rendered July 1, 1869, all persons were enjoined and restrained from interfering with the assets or property of the bank. The exceptions were correctly sustained by the court *a qua*.

C. Camutz, Syndic, v. The Bank of Louisiana, L. F. Genereux, Garnishee. 351.

SEE ESTOPPEL, No. 4—*Widow and heirs of Jean Pardo v. A. Pardo*, 364.

SEE TRANSFER OF PROPERTY, No. 1—*DeGreck & Co. v. Murphy et als.*, 296.

INSURANCE.

1. Where the contract of insurance contained the following clause :
 "This policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer by sale or otherwise without such consent, this policy shall from thenceforth be void and of no effect;"

Held—That this prohibition does not apply to the assignment of the interests of one partner to the other, and that it can not be inferred to have been the intention of the contracting parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants, on pain of forfeiting the policy.

The prohibitory clause must be construed strictly, and if its application to the case before this court be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance.

It is true the clause expressly prohibits the transfer by sale or otherwise of the policy; but it does not expressly prohibit a change of interests among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other.

If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument and not left to inference, because a prohibitory clause can not be extended by implication.

Antonio Dermani v. Home Mutual Insurance Company of New Orleans, 69.

2. In a contract of insurance, as in every other, it is the intention of the parties that must be considered. In the instrument before the court there is nothing to be found to warrant the conclusion that the plaintiff forfeited the policy by accepting the assignment of his partner's interest in the business, without the written consent of the defendants.

INSURANCE—Continued.

In the course of business partners often become dissatisfied, and change the firm by one party transferring his interest to the other, as was done in this case. This occurrence is so common, that these parties must be presumed to have contracted, knowing it might arise during the period of the insurance, and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument.

By the assignment in question no new party was introduced into the contract whom the defendants might not be willing to trust. In issuing the policy to Joseph H. Taboury & Co., they virtually declared the trustworthiness of each of the partners, so that it can not be objected that, by virtue of the assignment to plaintiff, the defendants were forced to insure a person they had not consented to trust. *Ibid.*

3. Where the life policy of insurance contained the following clause: "This policy shall not be binding on the company, until countersigned by J. R. Purvis, agent, of New Orleans, Louisiana, and the advance premium paid," and where before the policy was received by the agent at New Orleans, John W. Hardie, the person intended to be insured, died;

Held—That the premium never having been paid, and the policy never countersigned by J. R. Purvis, the agent, or delivered to the assured or his representative, the plaintiff can not recover.

The obligation contracted by the company was a suspensive conditional obligation, depending upon future and uncertain events which have not happened.

Mrs. Lydia A. Hardie v. St. Louis Mutual Life Insurance Company, 242.

4. The plaintiff sues defendant for the alleged loss of a stock of goods by fire. The only important question in the case is, whether the action is barred, because it was not brought within one year from the date of the loss. The fifteenth condition of the policy provides: "All claims under this policy are barred unless prosecuted within one year from the date of the loss. No claim for loss to bear interest before judicial demand."

The court finds nothing doubtful or ambiguous in this clause of the policy. It means what it says: "That all claims under the policy are barred unless prosecuted (that is sued on) within one year from the date of the loss."

Adam H. Carraway v. The Merchants' Mutual Insurance Company, 298.

5. A man may take out a policy of insurance on his life in the name

INSURANCE—Continued.

of any one, or having taken it out in his own name, he may, with the consent of the assurers, transfer it to whom he pleases.

Succession of A. Constant Hearing, 326.

6. A policy of insurance is not a piece of property ; it is the evidence of a contract, the contract being that a certain sum of money will be paid upon the happening of a certain event, to a particular person, who is named in the policy, or who may be the legal holder thereof. *Ibid.*

7. A creditor may have the life of his debtor insured, even without the consent of his debtor. A husband has the right to insure his life in the interest of his wife and child, as well as in the interest of his creditor. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event secured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed.

It is the wife whom the husband seeks to protect when he insures his life in her behalf. Otherwise he would not insure in her name. He has no need to protect his creditors by such a mode, for they can protect themselves. *Ibid.*

8. Plaintiff alleges that he is the owner of a certain insurance scrip of the Crescent Mutual Insurance Company and of certain dividends accrued thereon, which the defendants refuse to deliver to him. Defendants admit that they held such scrip and dividends, but aver that the same were garnished in their hands by one Hillman, a judgment creditor of plaintiff; that, subsequently, judgment was rendered in favor of Hillman against defendants, as garnishees, who have paid said scrip and dividends to said Hillman; and they therefore deny any liability to plaintiff.

There are two insurmountable difficulties in the way of the defense set up by respondents:

First—Plaintiff's assets or property in their hands was not seized by the garnishment process, because the *feri facias* was not in the sheriff's hands when the interrogatories were answered; and the judgment against them in that proceeding was a consent judgment not binding on the plaintiff, nor in any manner divesting his title to the property in question.

Second—The judgment upon which the pretended garnishment process issued, was an absolute nullity, because there was no citation served on Matthews against whom it was rendered; and a seizure or sale under a judgment, void from want of a citation, neither confers a right nor divests a title.

Edward Matthews v. Crescent City Mutual Insurance Company,
386.

INSURANCE—Continued.

9. Hawes & Bowen of the city of New Orleans, transferred to W. S. Pike, as assignee of their creditors the steamer "Wm. Tabor," of which they were sole owners. Pike effected an insurance on said steamer in the office of the defendant. A short time after, the master and mariners of the vessel committed barratry by causing her to be fraudulently stranded on the rocks near Key West. The vessel and cargo were brought to Key West, where a large portion of the cotton on board was condemned for salvage. The vessel then proceeded to New York, where, on her arrival, she was immediately libelled by the owners of the cotton for its non-delivery in consequence of the barratry of the master and mariners. She was sold to satisfy the decree for damages, and the proceeds were insufficient to cover them.

The instrument referred to purports to be a transfer or sale of the vessel, but the constituent elements of a contract, and not what the parties call it, must be considered in order to determine its character.

An examination of that instrument shows that it was neither a sale nor a *contract of giving in payment*, but an innominate contract imposing certain limitations upon the ownership of Hawes & Bowen, and conferring certain rights as to the vessel upon the assignee in behalf of their creditors. It has the features of the contract of pledge and of the contract of mandate. It was not a sale which divested Hawes & Bowen of their ownership. Therefore, as the creditors were not the owners of the vessel, as they undoubtedly had an insurable interest in her, and as the policy was knowingly issued for their benefit, it follows that they can recover from the defendant through the plaintiff who is their representative, the loss resulting from the barratry of the master.

The plea of the defense that the loss occurred by stranding, and that stranding is not covered by the policy unless produced by stress of weather, or some other unavoidable cause, can not be maintained. It was the barratrous conduct of the master which caused the stranding and the loss; barratry being insured against, and the vessel being a total loss to the creditors, the plaintiff is entitled to recover.

William S. Pike v. Merchants' Mutual Insurance Company, 392.

10. The insurance company, defendant in this case, refuses to pay, on the ground that the policy excepted liability, "if the insured should die by his own hands," and it alleges that he committed suicide.

It is evident that these words can not be interpreted in their literal sense, for they would exempt the company from liability if the in-

INSURANCE—Continued.

insured came to his death by the accidental discharge of a gun or pistol in the hands of the insured, or if he took poison through a mistake, while they would not exempt the company from liability if the insured were to commit suicide by jumping into a precipice or a river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words, and the court thinks that the common intent was to exempt the company from liability from the *voluntary destruction* of the insured by whatever means accomplished.

It is not believed that, by the expression above mentioned, the parties intended to exempt the risk that the insured might become insane, and might, when in that state, commit suicide.

The test of responsibility in civil as well as in criminal cases, is the state of the actor's reason or mental faculties. Therefore, if the deceased were insane when he committed the act of self-destruction, no responsibility attaches to his act.

The onus of proof is on the party who affirms the fact that the insured died by his own hand, and this has not been legally proved in this case.

It is true that the witnesses who testify as to his death express it as their *opinion* that he killed himself or committed suicide, but their opinions can not be regarded as evidence of the fact; nor do the facts and circumstances proved point to the voluntary self-destruction of the insured, to the exclusion of all other reasonable hypothesis. But if that fact were established, the plaintiff has proved that the deceased was insane at the time and before his death.

Mrs. Regina Phillips v. The Louisiana Equitable Life Insurance Company, 404.

11. The following note was given to defendants for a part of the premium due on renewal for a policy of insurance: "New York, May 7, 1870. Three months after date, *without grace*, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and twenty-nine dollars and interest, value received in premium on policy No. 2051 (37,593), which policy is to be void in case this note is not paid at maturity according to contract in said policy."

The question is whether this note was payable at noon, on the eighth of August, 1870, (the seventh being Sunday), or during business hours.

The portions of the policy relied on by the defendants as fixing the maturity of said note are the following: "And the omission to pay the said annual premium on or before twelve o'clock noon, on the

INSURANCE—Continued.

day or days above mentioned for the payment thereof, or failure to pay at maturity any note (other than the annual premium note) given for premium interest or other obligation on this policy, shall then and thereafter cause said policy to be void, without notice to any party or parties interested herein."

The insured paid a portion of the premiums in cash and for the balance gave three notes, one of which is above transcribed. The receipt of the company runs thus: "Renewal No. 69,003. New York, May 7, 1870, received of Azema Leigh seven hundred and ninety-eight dollars and eighty cents in cash, and notes (exclusive of interest as stated in the margin hereof), which amount, *if said notes are duly paid on or before the maturity thereof*, will complete the payment of the premium necessary to continue policy No. 2051 in force until the seventh of May, 1871, at noon, and in case said notes, or either of them, shall not be paid *on or before the maturity thereof*, said policy shall at once become void without notice," etc.

In the opinion of the court the notes referred to in the policy as being payable at noon, are the annual premium notes, which are due on seventh of May of each year, and not the notes given for a part of the premium and falling due at such dates as may be agreed upon at the time. Whenever the words "at noon" are used in the policy, it is in immediate connection with the words "seventh of May." The note itself and the receipt contain the stipulation in general terms, that, "if not paid at maturity," the policy will be void. The expression or words at the end of the note, "*according to contract in said policy*," must be construed as referring to the effect of non-payment at maturity—the contract in that respect—rather than the hour at which the note must be paid.

The words "at maturity" refer to and include the whole day unless specially and distinctly limited to a certain hour of the day. The expression, "three months after date without grace," means that the note is to be paid on the last day of the three months, without the usual three days of grace. No reference is made to hours. The annual payments were to be made by noon of the day, because probably the policy was fixed to *expire at noon*; but the notes for the stipulated installments of the *extended* premium were taken as an accommodation to the party, and were to be paid at maturity in the ordinary signification of the term.

Mrs. Azema Leigh, Widow v. Knickerbocker Life Insurance Company, of New York, 436.

12. The growers of certain cotton shipped the same to the respective plaintiffs, by the New Orleans, Jackson and Great Northern Rail-

INSURANCE—Continued.

road. The cotton was destroyed by fire while in one of the railroad company's cars. The insurance company in which it was insured paid the loss, and the question is, whether the insurance company can recover its loss from the railroad company? It must be answered negatively.

There was no contract between the two companies; consequently there was no obligation from the one to the other. There was no conventional subrogation from the assured to the assurers, and there was certainly no legal subrogation by which payment by the one entitled them to payment from the other.

The insurance company paid the loss for which they received a premium for insuring against, to the persons who suffered the same. As there was no obligation between them and the railroad company, and as no obligation existed towards them from the railroad company, they have no claim against it.

D. R. Carroll & Company v. the New Orleans, Jackson and Great Northern Railroad Company, and Alcus, Scherek & Company v. The Same. Consolidated, 447.

13. On the twenty-first of April, 1868, the plaintiff wrote to Pemberton, president of the Merchants' Mutual Insurance Company, a letter to effect a policy on the steamer Texas. In that letter he said: "By agreement with Darden, he (Darden) was to insure the steamer and to transfer policy to me to the extent of \$5000. Darden effected insurance, failed to pay the policy, say, \$957 75, which I paid myself. Darden has since fraudulently sold his interest in the steamer as acquired from me, and she is now in the hands of the United States Marshal for debts contracted since sale and will be sold to-morrow. As I have paid for the policy and have now identically the same interest in the steamer that I had when the policy was taken, I desire to have the policy continued to the time of its expiration for the interest transferred to me, say, \$5000." The policy referred to was to run to the twenty-fifth of November 1868. On the twenty-third of September of the same year the vessel was totally lost by a peril insured against.

It appears that on the twenty-third of April, Pemberton had acknowledged receipt of plaintiff's letter of the twenty-first of the same month and said in a postscript: "The risk on steamer Texas to continue in force under the clauses and conditions of policy No. 2500. But in the meantime, on the twenty-second of April, during the interval elapsing between the date of plaintiff's letter and that of Pemberton's answer, the vessel, in accordance with admiralty proceedings, had been sold, and the proceeds were distributed in a *concurso* of claimants. Under such circumstances, the answer of

INSURANCE—Continued.

Pemberton had not the effect of continuing the insurable interest of the plaintiff, whose privilege and interest had been divested by the marshal's sale.

Such a defense is not precluded by the doctrine of estoppel. The letter of Pemberton did not change plaintiff's rights, or cause him to act so as to alter his previous position. It did not create a right or confer one which did not previously exist. It simply proposed to continue such rights as the plaintiff had under the policy. But after the marshal's sale, the plaintiff could have no right under that policy. His interest was transferred from the vessel to the proceeds. No new contract of insurance was made; no new or additional premium paid. The parties were simply mistaken as to the continued existence of plaintiff's insurable interest

W. S. Pike, Assignee v. Merchants' Mutual Insurance Company, 505.

INTERROGATORIES.

1. The plaintiff's answers on facts and articles being obtained by defendant, these answers must prevail over all unsupported testimony of the defendant. *James Christian v. H. F. Vickers*, 693.

SEE GARNISHMENT, No. 5—*Thomas v. Fuller*, 625.

INTERVENOR.

1. The plaintiff being ostensibly the owner, under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner and as such entitled to both the property and its revenues, he must seek his remedy in a different direction.

B. K. Hunter v. M. J. Dunham et al.—*T. H. J. Richardson, Intervenor*, 141.

2. The intervenors have not in this case, as consignees, acquired a superior right to the cotton shipped to them, because it was attached by plaintiffs before the bill of lading was delivered to said consignees.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it, because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

Delop & Co. v. Windsor & Randolph—*S. H. Kennedy & Co., Intervenor*, 185.

3. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being

INTERVENOR—Continued.

mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

The position taken by the intervenors that they are the owners of the cotton and therefore entitled to its proceeds, contradicts their judicial admissions in their petition of intervention, and therefore can not be permitted. *Ibid.*

4. A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing seized; second, when he contends that he has a privilege on the proceeds.

In this instance it is not contended that the minors on whose behalf an intervention is made, own the property seized; and if they had a privilege on its proceeds, about which this court says nothing, it could only be enforced when the sale had been effected. It has not been shown that there is any law authorizing a judge to order, as he did, the sheriff to make no title to property to be sold under execution unless it bring the price fixed upon by him.

Desiree Hickman v. Amos B. Thompson, 260.

5. In the intervention of West, the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the district court was without jurisdiction *ratione materiæ*. If the property he claimed belonged to him, he should have sued for it in a court of competent jurisdiction.

J. P. Cross v. F. P. Parent. E. Parent and B. J. West, Intervenors, 591.

6. The defendant, dative tutrix, alleging that the condition of the estate of her deceased husband required a sale of the property belonging to it, had it sold after the usual judicial proceedings, and purchased it all. She subsequently filed a tableau placing herself thereon as a creditor for a sum larger than the property was appraised at. This tableau was homologated. After the adjudication she mortgaged the property to certain individuals. One of the defendant's children prays that said sale be declared null and void. Payne, claiming to control said mortgage, intervenes to have said mortgage recognized and enforced.

The exception to the intervention on the ground that the demands made by the intervenor were not incidental to, or necessarily connected with, the actions between the parties, is not well founded. The foundation upon which the intervenor's mortgage rested, was the sale under order of court to the defendant. If the sale was null, his mortgage was null also, because the defendant would not have had any title to the property mortgaged. Although the judgment in this case, between the plaintiff and defendant, would

INTERVENOR—Continued.

not probably have been conclusive of his rights, he not having been a party to the suit, still he had such an interest in the result in the controversy as to entitle him to intervene.

The title to the property purchased by the defendant as stated, is, as to third parties, good and valid. Those who dealt with her did so under the faith of judicial proceedings. To set aside the sale made under the authority of justice and thus destroy the mortgage which was taken as the result thereof, and which was accepted in good faith, would be to make like proceedings snares instead of shields.

If plaintiff's tatrix has assumed responsibilities towards her, and has been derelict in the performance of any duty, the judgment of the district court in this case reserves her rights against said tatrix, and this is her only recourse.

Susan A. Webb v. Amelia E. Keller. Payne et al. Intervenors, 596.

SEE HUSBAND AND WIFE, No. 9—*Barron v. Sollibellos*, 289.

JUDGMENT.

1. A judgment, after its transfer, may be executed in the transferer's name, but if it be the transfer of a litigious right, as charged in this case, the debtor—the appellant herein—has not tendered payment of the price given, in order to put an end to litigation.

A. W. Walker v. E. Villavaso, 42.

2. The judge *a quo* can not be compelled by *mandamus* to reduce the amount of the bond fixed by him to set aside a judicial sequestration. A judge may be compelled by *mandamus* to act, in a particular case, but having acted, his judgment can not be revised except on appeal. One can not be compelled to change one's judgment in a matter where one has the right to judge.

State of Louisiana ex rel. Benton v. The Judge of the Superior District Court, parish of Orleans, 116.

3. A judgment signed in vacation is no judgment. Being no judgment, no appeal could be taken from it. Relator has the right to see that the judgment of which he complains be regularly signed.

State ex rel. S. D. Dixon, tutor v. Judge of the Fifth District Court, parish of Orleans, 119.

4. A judgment can not be annulled unless all the parties to it are cited.

John W. Willis v. Lewis L. F. Peet, 156.

5. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

In this case of *Halpin v. Barringer*, judgment was rendered for plaintiff, and a *fi. fa.* having issued, Woelper was made garnishee. He answered that he had certain funds deposited in his hands, in a certain suit. Upon this answer, judgment was rendered against him. This judgment is wrong.

JUDGMENT—Continued.

The judgment in the case in which Woelper was made garnishee, was against Barringer individually, in so far as the record discloses. The money in the hands of the garnishee belonged to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him, and the payment of such a judgment would not release the garnishee.

Patrick Halpin v. Jahn L. Barringer—W. Woelper, Garnishee, 170.

6. Where the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court, the motion to dismiss the appeal must prevail.

O. E. Girard & Co. v. The City of New Orleans, 291.

7. The defendants invoke their title as purchasers by mesne conveyance from the succession of Elizabeth Clew through John F. Clew, who acquired the property from that succession under the last will and testament of Elizabeth Clew, duly approved, registered and executed by judgment of the Second District Court, and put in possession as universal legatee under that will, this action of the Second District Court of New Orleans being, as it seems, predicated upon the proof that the will of the decedent had been duly admitted to probate by a decree of the surrogate of the county of New York.

Rights acquired by third parties by virtue of a judgment which is rendered by a court of competent jurisdiction after fulfillment of all the legal forms and requisites, and which is final and executory, become, as a general rule, fixed and absolute, and can not be divested by a subsequent reversal of the judgment upon a devolutive appeal.

An exception to the above mentioned rule would be where fraud had been practiced in obtaining the final judgment and the party in interest was party to the fraud, or where fraud is apparent upon the record and could have been detected by an inspection of it. No exception of this sort is pretended to exist against the rights claimed by the defendants.

James B. Taylor et al. v. Charles Lauer et al., 307.

8. The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute his appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment; nor is it impossible to declare the judgment null and inoperative as to the appellants, and leave it undisturbed as to the others against whom it is rendered.

JUDGMENT—Continued.

One judgment debtor has the right to be relieved from an erroneous judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The exception to the jurisdiction of the court below, *ratione materie*, should have been sustained, the interest of the plaintiff being less than five hundred dollars. Plaintiff has no greater right to annul or injoin in this proceeding the bonds issued by the police jury of the parish of Concordia, than if he were resisting the payment of his tax levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

George L. Walton v. Police Jury, parish of Concordia, et als., 355.

SEE MANDAMUS, No. 1—*Citizens' Bank of Louisiana v. A. Dubuclet*, 81.

SEE EVIDENCE, No. 5—*Bonella & Caballero et als. v. Charles Madual*, 112.

SEE EVIDENCE, No. 15—*Succession of Pipes*, 203.

SEE JURISDICTION, No. 3, 4, 5, 6—*R. O. Oglesby v. Wm. B. Helm*, 61.

SEE JURISDICTION, No. 7—*Succession of Harriet L. Vaughn*, 149.

SEE BONDS, No. 16—*Pottier v. Grant, et al.*, 283.

SEE SUBROGATION, No. 3, 4—*Dockham, Wife v. City of New Orleans*, 302.

SEE SEIZURES AND SALES, No. 12—*Galagher v. Abadie*, 343.

SEE LEASE, No. 2—*McCarthy v. Baze et al.*, 382.

SEE INSURANCE, No. 8—*Matthews v. Crescent City Mutual Insurance Company*, 386.

SEE ADMINISTRATOR, No. 10—*Succession of A. Decuir*, 222.

SEE ADMINISTRATOR, No. 14—*Thacker v. Dunn*, 442.

SEE TAXES AND TAX COLLECTORS, Nos. 12 and 13—*City of New Orleans v. Rawlins*, 470.

SEE TAXES AND TAX COLLECTORS, No. 14—*City of New Orleans v. Ker*, 491.

SEE CORPORATIONS, No. 7—*Killgore v. Nicholson et als.*, 633.

JURIES AND JURORS.

1. After the regular panel of jurors was exhausted, and only four jurors therefrom had been sworn, the district judge ordered the sheriff to summon and select one hundred talesmen to appear on the following day to complete the jury, and continued the case. The challenge to the whole array of talesmen when produced, was properly overruled.

State of Louisiana v. James Gallagher, 46.

JURIES AND JURORS—Continued.

2. If the jury can not be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court or its vicinity.

It is not said in the challenge that there were any bystanders present when the panel was exhausted, and this court is bound to presume, in the absence of proper evidence to the contrary, that the district judge and the officers of the court *a qua* did their duty. *Ibid.*

3. Where the assignment of error is that the judge *a quo* erred in overruling the motion of defendant to quash the panel of tales jurors, because they were selected by the sheriff and not drawn from the list of registered voters as the regular panel, it was

Held—That the facts, as to this matter, having not been brought up in a bill of exceptions, it must be presumed that the judge and sheriff did their duty. But this court can properly state in this connection that talesmen are not regular jurors and are not to be drawn and summoned as such. They are necessarily to be summoned without observing the formalities of drawing and summoning the regular panel.

State of Louisiana v. Austin E. Smith, 62.

4. Where the indictment recites that the grand jurors were duly impaneled and sworn, if it be sacramental for the expression, "upon their oath present," etc., to be used, this court has no doubt it was so used—the whole of said expression being in the transcript except the word "oath"—which is necessarily a clerical error.

Ibid.

5. Where the exception was to the refusal of the judge *a quo* to send the jury back for further deliberation, after the jury had returned a verdict of guilty against the defendant Gaetano Rosa, accompanied with the recommendation of mercy—the request being predicated upon the declaration of the foreman of the jury that, in rendering the verdict with recommendation to mercy, it was expected that the court might be enabled to inflict a milder sentence;

Held—That the exception is not well founded and must be overruled.

The court *a qua* decided correctly that the jury was sworn to bring in a verdict, and that the recommendation to mercy was mere surplusage.

State of Louisiana v. Gaetano Rosa and Rosa Rosa, 75.

6. Neither injury nor fraud having been alleged or shown, resulting from the venire, or drawing of the jury, or from any other irregularity on the trial of the defendant, no relief can be obtained by him under the ninth section of the act No. 94 of the acts of 1873, entitled "an act relative to juries," etc.

State of Louisiana v. Hamilton Miller, 579.

JURIES AND JURORS—Continued.

7. The challenge of a juror by the plaintiff because he could not read or write the English language, was not a good ground of challenge, but as it is not contended that defendant has suffered by the ruling of the judge *a quo*, it can not be declared a sufficient reason for reversing the judgment and verdict, and ordering a new trial. *Citizens' Bank of Louisiana v. J. Strauss*, 736.

SEE CRIMINAL LAW, No. 9, 10 and 11—*State v. Carro*, 377.

SEE CRIMINAL LAW, No. 19—*State v. Hoozer et als.*, 599.

JURISDICTION.

1. This case was originally brought before the parish court of Jefferson. Defendants excepted to the jurisdiction on the ground of the amount claimed, which they alleged to be above \$500. The exception was overruled, when the parish of Jefferson being divided, and a part of it being annexed to the parish of Orleans, the suit was transferred to the Fifth District Court of the latter parish. The same original exception being raised there, was set aside on the ground that it had already been passed upon by the court from which the case was transferred.

This is an error. The suit should have been dismissed for want of jurisdiction of the parish court. The district court took the case as it was originally presented. It follows therefore that the court before which the defendants were cited not having jurisdiction over them, they were never subject to it, and not being under its jurisdiction, no judgment could properly be rendered against them.

Louis Parker v. Shropshire & Anderson, 37.

2. Where the object of the suit is to cause the defendant to vacate premises, the occupancy of which he claims under a lease, and neither party claims a money judgment, it is the amount of the lease which gives jurisdiction to this court. That amount not being sufficient, the motion to dismiss the appeal must prevail.

Arnold Ellis et als., Trustees v. Solomon Silverstein, 47.

3. Where an application is made for the revision of a judgment for five hundred dollars and costs of suit, this court, of its own motion, must dismiss the appeal on account of a want of jurisdiction *ratione materiae*.

R. C. Oglesby v. William B. Helm, 61.

4. In order to determine the jurisdiction of the court, the amount in dispute at the time the suit was filed, alone must be considered. Costs, subsequently accruing, can not be estimated so as to give this court jurisdiction.

Ibid.

5. An action not revisable by an appeal is not revisable in this court by an action of nullity, or by an appeal from the judgment in the action of nullity.

Ibid.

6. This court not having jurisdiction of a judgment because the

JURISDICTION—Continued.

matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes prescribed by the Code of Practice. *Ibid.*

7. In the succession of Harriet L. Vaughn, the proceeding instituted by Mrs. Gilbert for the sale of property of the succession, by virtue of a judgment rendered in the Fifth District Court against said succession, is opposed by the heirs of the deceased on the ground that the judgment is absolutely null and void.

The district court having acted within its jurisdiction, the judgment rendered in favor of Mrs. Gilbert, whether sufficient proof was administered or not, was not an absolute nullity. The amount involved in that judgment is beyond the jurisdiction of the parish court; and the correctness of the demand upon which it is based, or the question of the sufficiency or insufficiency of the proof in support thereof, can not be adjudicated by the parish court for want of jurisdiction. Besides, a parish court can not revise the judgment of a district court.

Succession of Harriet L. Vaughn—On opposition to a rule to sell property to pay debts, 149.

8. Assuming that the exceptions filed to the original rule in this case by the defendant, Mrs. Pipes, are well taken, and that at that time the parish court had no jurisdiction *ratione materiae* or *ratione personæ*, her subsequent appointment as administratrix, which she provoked, brings the succession within the control of the parish court, and she has therefore subjected herself to its jurisdiction.

Succession of James W. Pipes, 203.

9. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section nine of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

10. In 1861, by an act of the Legislature, a part of the territory of the parish of Madison, embracing the plantation claimed in this suit, was transferred to the parish of Tensas after the decease of the owner, who died in 1855.

In 1867 an attempt was made to open the succession of the deceased in the parish of Tensas, by appointing a curator of absent heirs, who caused the property to be sold to pay debts, as it is alleged. It is through this sale that the defendant claims to hold.

The probate court of Madison parish, where the deceased had his domicile at the time of his death, had exclusive jurisdiction of his succession. Everything done in that succession in the parish of Tensas was therefore null and void.

Bettie Clemens, Guardian, etc. v. Francis Augustus Comfort, 269.

JURISDICTION—Continued.

11. This is made up of separate suits; the judgments were separate; and in none of the cases were \$500 demanded. They were consolidated and taken as it was merely for convenience. It follows that this court has no jurisdiction.

George Collins et als. v. Mississippi and Mexican Ship Canal and Draining Company, 276.

12. Plaintiffs agreed to furnish defendants with the means of supplies required to make a crop. Defendants agreed to ship their crop to the plaintiffs. Defendants made their crop and sent a portion of it to New Orleans, within the jurisdiction of the court *a qua*, to another person than the plaintiff. Said portion of the crop, on which plaintiffs claimed the furnishers' privilege for supplies, was sequestered by them.

The Seventh District Court erred in entertaining jurisdiction, because the domicile of the defendants was in the parish of St. Bernard. The conservatory order of sequestration was improperly granted, and, at the trial, should have been set aside and the suit dismissed.

The court, having no jurisdiction of the persons of the defendants, had no authority to determine either the amount or character of the demand set up against them by the plaintiffs; it could not decide that the defendants were indebted to plaintiffs in any specific sum, and that there was the furnisher of supplies privilege on the cotton sequestered.

P. Bradley & Co. v. Mrs. S. A. Woodruff and John McOrea, 299.

13. The defendants object that a dispute among the owners relative to the employment and sale of a vessel belongs exclusively to the admiralty jurisdiction, and that the State courts are without jurisdiction. That is not the question involved in this case. It is whether the defendants shall pay damages for breach of the contract of partnership, and also whether there shall be a settlement of partnership.

Richard Francis v. William Lavine et als., 311.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has

JURISDICTION—Continued.

prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thos. J. Emerson and Geo. F. Porter, 351.

16. It appears that Duggan & Guyol, against whom a personal judgment is sought, and whose cotton was sequestered, reside in the parish of East Baton Rouge. The Fourth District Court, parish of Orleans, whose proceedings are now under revision, was without jurisdiction to try this case.

This court, of its own motion, will notice the want of jurisdiction of the court *a qua*.

Guyol & Montegut v. Duggan & Guyol and Patton & Duggan, 529.

16. This is a suit on a promissory note secured by pledge. It is brought against the defendant, as a resident of the parish of Iberville, and was served on him personally in the parish of Orleans. As it is a personal action, unattended with any conservatory writ, the court *a qua* was clearly without jurisdiction against defendant.

Henry T. Sorrel v. Henry Laurent, 554.

17. The exception to the jurisdiction of the court of Concordia came too late after issue joined. It should have been made *in limine litis*.

Milton Wilson v. J. P. Benjamin et als., 587.

18. In the intervention of West, the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the district court was without jurisdiction *ratione materiae*. If the property he claimed belonged to him, he should have sued for it in a court of competent jurisdiction.

J. P. Cross v. F. P. Parent—E. Parent and B. J. West, Interveners, 591.

19. Where the execution under which the sale was to be made issued from the parish court, it is in that court that the disposal of the proceeds must be determined. The exception to the jurisdiction was properly taken.

A. Berard, Administrator v. C. Young, Sheriff, et als., 598.

20. Where it is evident that the basis of the action is the right to an account to be rendered by the testamentary executor, this court will, *ex proprio motu*, decide that the district court which rendered the judgment, had no jurisdiction *ratione materiae*. In this instance it is the demand of parties claiming to be heirs, in a succession under administration, and it should therefore have been instituted in the parish court.

Euphrasie Pelagie G. Tessier v. Robert Hart Littell, Testamentary Executor, 602.

JURISDICTION—Continued.

21. As to the sufficiency of the proof to sustain the charge of murder against the defendant, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

State of Louisiana v. Ozeme Fruge, 604.

22. If the plaintiffs have any rights in the land, a portion of which they claim by suit in the parish court, these rights descend to them from one succession which was opened in 1816, and another which was opened in 1859. Neither of these successions now exist. They have been closed. The property sought to be divided is alleged to be worth \$50,000. Under this state of facts the parish court was without jurisdiction.

Olet Provost et als. v. Ursin Provost, 611.

23. The parish court having made the appointment of tutor, and having jurisdiction of the tutor's administration, is the proper tribunal in which the tutor should be called on to account for and deliver the property of the minor to a legal representative of said minor.

The plaintiff, having satisfactorily exhibited evidence of his appointment as guardian of a minor in the State of Georgia, is entitled to sue for and recover the property in this State belonging to his ward.

The appointment of the defendant as tutor, contradictorily with and on the opposition of plaintiff's predecessor, did not conclude such predecessor, or the plaintiff, his successor, from asserting the right set up in this action, which is different from that involved in the former contest; nor was it necessary for the plaintiff to show before instituting this suit that no debts existed against the minor. Protection is provided in this respect by the Code.

David Bowen, Guardian v. F. E. Callaway, Tutor, 619.

24. It has been invariably held by this court that its jurisdiction can only attach by appeal properly taken, and that it has not a supervisory control over the inferior tribunals.

State of Louisiana ex rel. City of New Orleans et al. v. The Judge of the Superior District Court, parish of Orleans, and W. E. Murphg, 750.

SEE OFFICES AND OFFICERS, No. 11—*State ex rel. Cormick, v. Richardson*, 631.

SEE APPEAL, No. 8—*James J. O'Hara v. Succession of John Davidson*, 76.

SEE HUSBAND AND WIFE, No. 8—*Eliza Rainey v. Fanny Asher*, 262.

SEE MORTGAGE, No. 9—*Guilbeau v. Wiltz*, 600.

SEE GARNISHMENT AND GARNISHEES, No. 4—*Smith v. Durbridge*, 531.

SEE JUDGMENT, No. 8—*Walton v. Parish Jury of Concordia*, 355.

SEE ADMINISTRATOR, No. 14—*Thacker v. Dunn*, 442.

SEE APPEAL, No. 28—*Dugan et al. v. Police Jury of St. Charles*, 673.

LAWS AND STATUTES.

1. The second section of the immigration law of the State, enacted March, 1869, and re-enacted in the Revised Statutes of 1870, section 1722, is not in conflict with the constitution of the United States, which gives to Congress the exclusive right to regulate commerce with foreign nations and among the several States and with the Indian tribes. The State law in question is not a regulation of commerce between foreign nations, but a police regulation which the State may properly adopt for the protection of its own citizens.

In regard to the bonds exacted by said immigration law, their execution can not be enforced, no penalty being prescribed for refusal to execute them.

Commissioners of Immigration v. C. L. Brandt et als., 29.

2. This suit was brought under the second section of act No. 68, session of 1869, p. 67, which provides that it shall be unlawful for any person other than the master and wardens of the port of New Orleans, or their legally constituted deputy, to make any survey of hatches of seagoing vessels coming into the port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates or orders for the sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for the master and wardens to do and perform.

The section above referred to is not unconstitutional. The Legislature may not have the power to force a vessel which comes to this port from sea to have a survey made of her hatches, but it has the right to designate by whom a survey shall be made, if one is asked for by the captain or owner of the vessel. This is not a tax upon commerce. It is only saying by what officer a certain act shall be performed.

When the law says it shall be unlawful for any person to do a particular thing, the party who attempts to do it may be enjoined by any person in interest.

Master and Wardens of the Port of New Orleans v. Robert W. Foster, 105.

3. The taxes of the years 1867 and 1868 became due at least by the first day of December of these years; they were assessed respectively in the same years—the taxes for 1867 in 1867—those for 1868 in 1868.

Under the revenue act, approved April 4, 1865, numbered 55, and entitled "An Act to provide for increasing the revenue of the State and raising means to pay the interest on the State debt," the lien and privilege for taxes dated from the first Monday of July

LAWS AND STATUTES—Continued.

of the year for which the taxes were assessed, and continued for two years.

But the revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the continuance of the tax list to five years from the first of April of the year for which the taxes may be assessed. The last section of said act provides that it shall go into effect on the first day of January, 1869, and repeals, from and after its going into effect, all laws and parts of laws contrary to its provisions.

Dunlop & McCance v. Henry D. Minor et al.—Edward C. Palmer, Third Opponent, 117.

4. It was competent for the Legislature to lengthen the term of prescription in regard to tax liens. The act of 1868 is not understood by the court as repealing the thirty-second section of the act of 1865, but only as extending the duration of the lien.

The question of prescription must, in this case, be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription, and the other portion has passed under another and different term. According to this method, it is found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed. *Ibid.*

5. The defendant's objection is, that the law under which the parish tax is levied on retail liquor dealers in the parish of East Feliciana, is violative of the one hundred and eighteenth article of the State constitution, because the tax is not uniform, inasmuch as it is regulated by the amount of business which is done; those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5000, another sum, and so on. This objection is fatal.

Parish of East Feliciana ex rel. J. Oscar Howell, Tax Collector, v. John Gurth, 140.

6. Section 8 of act No. 47 of 1873, which disqualifies as a witness a delinquent taxpayer, published as such for thirty days, is unconstitutional.

This provision of the act under consideration is a regulation or rule of evidence enacted by the Legislature. The title of the act should then give some indication of it, which it does not. No one upon reading that title would imagine that the act contained any provision upon the rules of evidence or the right to be a witness in a court of justice. *John I. Adams v. Asa Webster*, 142.

7. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform

LAWS AND STATUTES—Continued.

per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector, v. Charles McVea, 151. Tax Collector, 154.

8. In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Succession of Henderson Randall, 163.

9. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

Delop & Co. v. Windsor & Randolph—S. H. Kennedy & Co., Interveners, 185.

10. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section 9 of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

11. Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol. It must be in writing, the law is prohibitory, and this court can not recognize any other proof to establish the fact.

Baker & Thompson v. Mrs. A. L. Pagaud, 220.

12. In the State of Mississippi a sale of personal property is complete by the mere consent of the parties and without delivery.

The cotton claimed in this case appears to have been made on Langley's place, and Tribble was to have an interest in the crop for his services—which interest was to be ascertained by arbitration. Before the arbitration Langley sold to the plaintiff. That sale vested the title to the cotton in Taylor, the plaintiff, and the attempt of the agents of Tribble to sell to the defendants was null, being the sale of the property of another.

W. B. Taylor v. Twenty-five Bales of Cotton and Blakemore, Woolbridge & Co., 247.

13. One of the defendants, A. L. Gusman, moved in the court below to transfer this case to the Circuit Court of the United States, on the ground that he is a citizen of the State of New York, and has that right under the act of Congress approved July 27, 1866, entitled "An Act for the removal of causes in certain cases from the

LAWS AND STATUTES—Continued.

State courts." It appears that there are two defendants besides the one making the application for the removal and that they are citizens of this State.

This being the case, it results from the decision of the Supreme Court of the United States, in the case of *Coal Company v. Blatchford*, 11 Wallace p. 172, that the case is not transferable under the said act of Congress.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 248.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thomas J. Emerson and George F. Porter, 351.

16. The peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act under which this suit is brought is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873, is not well taken.

There is no conflict between the essential provisions of the two acts; the only points of difference are that the latter act is of a less general application and the proceedings under it of more summary character. According to the return of both Returning Boards for the election held in November, 1872, the defendant was defeated. It is clear that the defense is without merit.

State ex rel. P. P. Carroll v. Philogene Jorda, 374.

17. A thorough examination of the question has led this court to the conclusion that the State has the power to grant to a railroad company the right of way through a street in the city of New Orleans.

New Orleans, Mobile and Chattanooga Railroad Company v. The City of New Orleans et als., 517.

18. Neither injury nor fraud having been alleged or shown, resulting from the venire, or drawing of the jury, or from any other irregularity on the trial of the defendant, no relief can be obtained by

LAWS AND STATUTES—Continued.

him under the ninth section of the act No. 94 of the acts of 1873, entitled "An Act relative to juries," etc.

State of Louisiana v. Hamilton Miller, 579.

19. Under the act of Congress, July 17, 1862, known as the confiscation act, and the joint resolution of the same date, explanatory of it, only the life estate of the person for whose offense the land has been seized, is subject to condemnation and sale.

When such person has, previously to his offense, mortgaged his land to a *bona fide* mortgagee, the mortgage is not divested. His estate and property in the land being but the land subject to the mortgage, any sale made in pursuance of the act passes the life estate subject to the charge.

T. Micou et al. v. J. P. & J. Benjamin and L. Madison Day, 718.

SEE EVIDENCE, No. 52—*State v. Widow de St. Rome*, 753.

SEE BONDS No. 19—*State v. Clinton and Dubuclet*, 346.

SEE COLORED PERSONS, No. 1—*C. Hart v. Hoss & Elder*, 90.

SEE POLICE JURIES, No. 3—*Nathan Lorie v. Bennett Hitchcock*,

SEE DONATIONS, 1, 2, 3—*Succession of Thomas Hale*, 195.

SEE CORPORATIONS, No. 4—*State v. Accommodation Bank of Louisiana*, 288.

SEE POLICE JURIES, No. 4—*Morgan & Co., v. Police Jury of parish of Rapides*, 281.

SEE LOCUS PUBLICUS No. 2—*New Orleans Sugar Shed Company v. Harris*, 378.

SEE BATURE No. 1—*Winter v. City of New Orleans*, 310.

SEE CRIMINAL LAW, 9, 10, 11—*State v. Frank Carro*, 377.

SEE CRIMINAL LAW, No. 13, 14—*State v. Shonhausen*, 421.

SEE SHERIFF, No. 5—*Adams v. Dinkgrave et als.*, 626.

SEE COURTS No. 1—*State ex rel. Collens v. Clinton*, 406.

SEE OFFICES AND OFFICERS, No. 9—*State ex rel. Claiborne v. Parlange*, 548.

SEE OFFICES AND OFFICERS, No. 11—*State ex rel. Cormick v. Richardson*, 631.

SEE TAXES AND TAX COLLECTORS, No. 16—*City of New Orleans v. Estate of Burthe*, 497, and No. 17—*City of New Orleans v. Louisiana Mutual Insurance Company*, 499.

SEE TAXES AND TAX COLLECTORS, Nos. 18 and 19—*State v. Maginnis*, 558, and Nos. 20 and 21—*State v. Clinton and Dubuclet*, 561.

SEE TAXES AND TAX COLLECTORS, Nos. 28 and 29—*Morrison v. Larkin*, 699.

LEASE.

1. Where the object of the suit is to cause defendant to vacate premises, the occupancy of which he claims under a lease, and neither

LEASE—Continued.

party claims a money judgment, it is the amount of the lease which gives jurisdiction to this court. That amount not being sufficient, the motion to dismiss the appeal must prevail.

Arnold Ellis et als., Trustees v. Solomon Silverstein, 47.

2. In this suit Lloyd has intervened and claimed the property seized. He had leased the office in which the movables were found to defendants. At the time of the lease some of the property seized was in the office. This property, belonging to Lloyd, was not subject to plaintiff's judgment, and the court *a quo* did not err in so deciding.

The balance of the property Lloyd claims under a bill of sale from the defendants, who, at the time of the sale, were in his debt for rent. The property, however, remained in the possession and under the control of the defendants. Lloyd alleges that it so remained with them as his agents. But there was no delivery, and this was essential. Therefore, on this point, the decision of the judge *a quo* against the intervenor is correct.

There was error, however, in condemning Lloyd to pay the costs. A portion of the property belonged to him. He enjoined the sale thereof. Judgment having been rendered in his favor for a part of the claim, the costs should have followed the judgment.

L. McCarthy v. G. Baze et al.—R. Lloyd, Third Opponent, 382.

3. The defendant was not justified in refusing to pay rent to plaintiff, on the ground that the house he leased from her was not put in repair, according to contract. His remedy was to put his lessor in default and make the repairs, deducting the amount thereof.

Under this view of the case, the ruling of the judge *a quo*, refusing to hear testimony as to the repairs that were necessary, was correct.

Mrs. M. E. Winn v. J. F. Spearing, 384.

4. The defendant clearly had no right to make material alterations in the leased premises without express permission. The injunction he appeals from did not restrain him from the exercise of any of the privileges and facilities he was entitled to by the terms of the lease.

Edward T. Denechaud v. Jean Trisconi, 402.

5. The plaintiff having acquired the right in his own interest, during the continuance of the lease of a part of a building, to prohibit the establishment of a grocery in the adjoining part of said building, in order to prevent competition with one of his own which he kept, was certainly at liberty to waive that right, and it is hard to see why such a waiver should not be a sufficient consideration for a contract entered into for the benefit of the person who desired such waiver.

Jean Trisconi v. A. D. Dumas and Francois Victor, 477.

LEASE—Continued.

6. This is a suit in damages on the allegation of having been maliciously ejected from leased premises. When a tenant denies the title of his landlord, the relation between them is severed, and the right of entry by the landlord is complete, but the entry must be effected under the law.

In this case it is not necessary to decide whether the manner of getting possession was proper or not, as the facts show that plaintiff was not damaged thereby. He failed to pay his rent, and under our law and jurisprudence the defendant was justified in seizing for the rent and attaching the property subject to the lease. In doing this in a legal manner, the defendant did not render himself liable in damages.

C. C. Thayer v. Rufus Waples, 502.

7. Short & Martin, a commercial firm, executed their notes for the rent of a store. Shortly after, Short withdrew from the partnership, and John A. Hall became a member of the former firm of Short & Martin. The new firm carried on their business in the same store leased by Short & Martin. It is clear that Hall is not bound for the notes of Short & Martin, unless he assumed to pay their debt. This assumpsit can only be established by written evidence, and that evidence has not been furnished.

The sequestration of the personal property of Hall, after it had been removed from the leased premises, for the payment of the debts of Short & Martin, was unauthorized. Whether the property seized had been removed from the leased premises, within fifteen days or not, is unimportant, inasmuch as the property did not belong to Short & Martin, the lessees.

Margaret A. Silliman v. Short & Martin and J. A. Hall, 512.

8. The lessor can not seize movables belonging to a third person, which have been removed from the leased premises within fifteen days before the seizure. It is the property of the lessee alone which can be seized under such circumstances.

John Hughes and Wife v. Charles F. Caruthers. Mrs. Ann M. Hennen, Third Opponent, 530.

9. The thing leased being destroyed in part by fire, the defendant had the right, under article 2697 of the Revised Code, either to demand a diminution of the price, or a revocation of the lease. He preferred the latter. In according to the defendant the exercise of a plain legal right, the court below committed no error.

Higgins & Maurer v. J. C. Wilner, 544.

SEE PLEADINGS No. 8—*Rochereau & Co. v. Mrs. Lewis and Husband*, 581.

LEASE, LESSOR AND LESSEE.

10. The possession of the lessee being only that of his lessors, when the fact was disclosed by the answer of the lessee, who is defendant in this instance, his lessors should have been made parties to the suit which is a hypothecary action against lands alleged to be mortgaged in favor of the plaintiff and owned by the lessors of defendant. No valid judgment could be rendered in the case without the parties interested being before the court.

D. O'Bryan, Agent v. George McVey, 608.

11. The question in this case is, whether at the expiration of a three years' lease, the defendant delivered a certain plantation with its buildings and appurtenances in a good state of repair, as he had bound himself to do.

Plaintiff having excepted to the introduction of testimony to show that the boards which were retained on one side of the house were as good as new, the judge *a quo* erred in maintaining the exception. The defendant's contract was to cover the house with good boards. Whether the boards were old or new matters not.

The judge *a quo* did not err in refusing the defendant the right to prove in what condition the leased premises were when he took possession of them. Whatever their condition was then, his obligation was to restore them in good repair. Neither did he err when refusing to admit in evidence plaintiff's receipt for rent. She was not suing for rent but damages. There was error, however, in refusing to prevent the defendant to establish that, when the money for the lease was paid, the plaintiff expressed herself satisfied with the condition of the premises.

The judge *a quo* erred also in not permitting the defendant to prove that the matters involved in this suit had been adjusted before proceedings were taken. His payment of the rent may have been made only upon the stipulation that it was to be regarded a final settlement between them.

It was proper to reject the testimony offered to prove that the fences of the leased premises were in as good condition as those of the neighbors; that they were sufficient to keep the stock in as well as out; that their state of dilapidation was the result of natural decay, etc. The only question was whether they were in a good condition at the expiration of the lease.

Mrs. Martha Grayson, Administratrix, and in her own right v. John Buie, 637.

LEGATEES.

1. The question in this instance is, whether the plaintiffs, as the particular joint legatees of the Hapaca plantation, are entitled to the revenues thereof from February, 1867, to the time of its delivery to the said legatees in September, 1873.

LEGATEES—Continued.

The second clause of article 1626, R. C. C., provides that "the particular legatee can take possession of the thing bequeathed, or claim the proceeds or delivery thereof, only from the day the demand for the delivery was formed, according to the order herein before established, or from the day on which that delivery was voluntarily granted to him."

It is admitted in this case that there is no express bequest of the revenues accruing prior to delivery; that no judicial demand was made for the delivery; and that no corporeal delivery was made until September, 1873; but plaintiffs rely on what they call a constructive delivery by the executors. Even if it were conceded that a constructive delivery can be made by executors, it is on record that by a special agreement with plaintiffs, the right to claim such constructive delivery was waived by said plaintiffs. It follows that under the provisions of the above cited article of the R. C. C., the revenues of the Hapaca plantation accruing before delivery, can not be successfully claimed by plaintiffs.

Mrs. Eveline M. May, wife et al., v. Ogden and Stansbrough, Executors, 239.

LOCUS PUBLICUS.

1. The only question presented in this suit was decided in the case of *Marquez v. The city of New Orleans*, 13 An. 320. The court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the proprietors on the north side. That case and the one at bar seems to be identical.

Gabrielle Correjolle v. Succession of Louis Foucher, 362.

2. The capital of the plaintiffs is invested in a sugar shed constructed on a *locus publicus*, pursuant to a contract with the city of New Orleans. They have two hundred and forty thousand dollars of capital invested in the enterprise; they employ this sum in administering the business of keeping a sugar shed on this *locus publicus*. Such an investment can not fairly be considered as an investment in real estate within the meaning of act No. 42 of the acts of 1871.

If the plaintiffs had invested their capital in and become owners of real estate to the amount thereof, it would be manifestly unjust to assess that property and at the same time to tax the sum so invested as capital stock.

Under the provisions of the act in question, intended to exempt property from double taxation, no warrant whatever can be found in

LOCUS PUBLICUS—Continued.

support of the pretensions of the plaintiffs in regard to an entire exemption of their property from taxation.

New Orleans Sugar Shed Company v. H. H. Harris, Tax Collector, 378.

3. The mere fact that for thirty or forty years the public was permitted to pass over a certain piece of land, would not of itself constitute the place a *locus publicus*. The property which is the object of this litigation has never been dedicated to the public, nor has any expropriation taken place. Therefore it remains private property.

Charles Morgan v. G. Lombard, 462.

MANDAMUS.

1. The Citizens' Bank, obtained, by mandamus proceeding against the State Treasurer, a judgment in the Superior District Court, ordering him to pay the bank \$200,000, and the plaintiff now prays that an injunction issue to restrain the Treasurer from paying any warrant or warrants out of the general fund, until he shall have paid the petitioner the said sum of \$200,000.

The position taken as to the right to question in this suit the validity of plaintiff's claim, which is based on a final judgment, is correct; but the remedy sought by injunction can not be accorded. This is not the mode of enforcing or executing a judgment in a mandamus suit.

Citizens' Bank of Louisiana v. A. Dubuclet, State Treasurer, 81.

2. The judge *a quo* can not be compelled by mandamus to reduce the amount of the bond fixed by him to set aside a judicial sequestration. A judge may be compelled by mandamus to act, in a particular case, but having acted, his judgment can not be revised except on appeal. One can not be compelled to change one's judgment in a matter where one has a right to judge.

State of Louisiana ex rel. Benton v. The Judge of the Superior District Court, parish of Orleans, 116.

3. This court can only mandamus a district judge for the purpose of maintaining and enforcing its appellate jurisdiction.

State ex rel. Richard Taylor v. The Judge of the Superior District Court, parish of Orleans, 121.

4. The objection that this is a suit against the State, for the instituting of which permission has not been obtained from the Legislature, is not well founded. It is a mere application to a court of competent jurisdiction asking for a writ of mandamus against an officer of the State, commanding him to perform one of the duties of his office, to wit: to pay the sums which the Auditor, in conformity to law, has ordered him to pay.

The warrants held by the relator are sufficiently described. Their

MANDAMUS—Continued.

number, date, amount, and in whose favor they were issued, are specifically set forth, and the petition alleges that they were judicial warrants. The list containing these details was offered in evidence and received without objection, and there is no charge that they are spurious, and that the signatures thereto are not genuine.

No law has been exhibited which requires the Treasurer to give preference of payment to warrants of older date and lowest number, nor has it been shown that such has been the practice in the Treasurer's office. On the contrary, it has been the reverse.

It has been shown to this court that, while its doors remained hermetically closed against certain *bona fide* creditors of the State, it lay all unlocked to the occasions of others, who had no right of precedence over their competitors. All men are equal before the law, and all men, having equal claims upon the State for the payment of a common debt, have equal rights upon the common treasury.

State of Louisiana ex rel. E. Merle v. A. Dubuclet, Treasurer—

State ex rel. John Chapus v. The Same—Consolidated, 127.

5. A mandamus can properly issue against the Treasurer only when he has money, and illegally withholds it from one entitled to be paid. If he refuses to pay one creditor of the State and gives an illegal preference to another and pays to him all the money in his hands, he may make himself amenable to the law, which fixes his duty and imposes heavy penalties for the dereliction of that duty, but it is not a proper case for a mandamus.

To order the Treasurer in this proceeding, and under the circumstances of the case, to pay whenever the treasury may be replenished, is equivalent to a judgment on an ordinary proceeding, and would give in effect a preference to the relator, or is tantamount to an order in advance to the Treasurer to do what he has not refused to do, and what it must be presumed he will do, until the contrary be shown, as the presumptive evidence is in favor of an officer doing his duty. *Ibid.*

6. The defendant can not be proceeded against by mandamus to pay into the parish treasury \$5000 which he has collected as tax collector.

State of Louisiana ex rel. P. A. Simmons, President, and Charles Leroy, Treasurer v. D. H. Boullet, 259.

7. The writ of mandamus, it has been settled, may issue to compel a public officer to perform a mere ministerial duty; but it must clearly appear that the duty is one which from its character leaves no discretion in the officer to do or not to do.

MANDAMUS—Continued.

Here it does not clearly appear from the record that it is absolutely the duty of the respondent to do the things required of him. He avers that the contract asserted by the relator is null and void, and he annexes his affidavit of the truth of his averments. It is not his duty to execute an illegal and void contract, knowing it to be such.

State ex rel. Romaine v. J. R. West, Administrator of Public Improvements, and City of New Orleans, 322.

MARRIAGE.

1. Margaret Morgan, the surviving wife and natural tutrix of the child of the deceased, opposes a creditor's application for the administration, and claims it in her own right and as tutrix of her child.

In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Therefore, the fact of deceased having married while a slave in Mississippi, did not prevent, notwithstanding the former wife still continued to exist, his lawfully marrying Margaret Morgan in Louisiana, where he resided after his emancipation. Besides it is not in evidence that Margaret Morgan knew of his having another wife when he married her.

Succession of Henderson Randall, 163.

SEE COLORED PERSONS, No. 1—*C. Hart, Tutrix v. Hoss and Elder, 90.*

SEE EVIDENCE No. 5—*Bonella & Caballero et als. v. Charles Maduel, 112.*

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MONITION.

1. At a succession sale of the property of the estate of Horace Groves, deceased, made in the parish of Tensas, on the eighteenth of April, 1868, a certain tract of land was adjudicated to E. Slicer. He afterwards sold the land to Mrs. Julia Scott, who obtained a monition in the parish of Tensas to secure her title, and said monition was homologated by judgment of the district court on the twentieth of October, 1873, from which judgment an appeal has been taken by certain heirs of the deceased, on the ground that said succession had been fraudulently opened in the parish of Tensas, when it was well known that it had been opened and was being administered in the parish of Madison, where the land in question was situated, before its being subsequently located in the

MONITION—Continued.

parish of Tensas, in consequence of a change of boundaries by virtue of an act of the Legislature.

In this case, Mrs. Julia Scott seeks by a monition taken out in the parish of Tensas to defeat a claim set up against her in the district court of the parish of Madison for the very tract of land sought to be disencumbered of all adverse claims by the monition. To this petitory action of the appellants in the district court of the parish of Madison, Mrs. Scott had answered, and when this suit was in progress in the proper court, she applied for a monition in another parish. It would be subversive of all propriety of legal proceeding if Mrs. Scott could by a flank movement of this sort conclude the rights of the appellants and confirm irrevocably her title to the land.

The appellants are not therefore affected by the judgment homologating the monition. Their judicial demand, claiming to be the owner of the land, was to all intents and purposes as effectual notice to Mrs. Scott, as if they had presented themselves in the parish of Tensas and made a formal opposition to the monition.

Mrs. Julia Scott and Husband v. The World, 285.

MORTGAGE.

1. The special mortgage given by the natural tutrix of the plaintiffs in 1858 was strictly in conformity to law, and the tacit mortgage sought to be enforced against her or those who hold under her was legally extinguished.

It is well settled that the holder of property under recorded titles, can give a valid mortgage thereon where the mortgagee has acted in good faith, and the transaction is a real one, regardless of the simulation of the mortgageor's title.

Cora and Louisa Brusle and Husband v. Mrs. Levinia Jane Hamilton, widow of R. C. Downes; O. P. Hebert Intervenor, 144.

2. The intervenors have not in this case, as consignees, acquired a superior right to the cotton shipped by them, because it was attached by plaintiffs before the bill of lading was delivered to said consignees.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it, because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

Delop & Co. v. Windsor & Randolph—S. H. Kennedy & Co., Intervenor, 185.

MORTGAGE—Continued.

3. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

The position taken by the intervenors that they are the owners of the cotton and therefore entitled to its proceeds, contradicts their judicial admissions in their petition of intervention, and therefore can not be permitted. *Ibid.*

4. The main question in this case is, whether a plantation having been sold at the suit of the first mortgagee, the rights of subsequent mortgagees are transferred by the sale to the proceeds—said mortgages no longer subsisting. The decision of the controversy depends on the interpretation to be given to a clause in the *concordat* between certain debtors and their mortgage creditors of superior and inferior rank.

This court thinks that said clause, which is recited at full length in the judgment, did not bind Mrs. Crozat, one of the first class creditors, in case of her foreclosing her mortgage, to cause the property to be sold at one, two and three years, for the reason that her mortgage was not novated, that her note was not identified with the *concordat*, and that she could not proceed under it to enforce her mortgage rights. Her purpose, in becoming a party to the *concordat*, was simply to give certain debtors an opportunity to pay their debts to their creditors by suspending the enforcement of her mortgage to a given time, provided the interest on her claim was punctually paid. The failure to pay this interest, which was made the express condition of her agreement to the delay, released her from the obligation of said contract, and restored her to her full rights under her own act of mortgage.

Mrs. Crozat did not expressly consent in the *concordat*, to enforce her first mortgage under the stipulations of that second act, and it is not to be presumed that she gave up more of her rights than were clearly and distinctively waived or relinquished. This act is to be construed liberally in her favor, as no one is presumed to give. She had therefore the right to seize and sell as she did. The sale and adjudication to the plaintiff having been legally made, and the price absorbed by the first and second mortgages, those created in favor of the third mortgagees are properly canceled, and the plaintiff can not be disturbed in the rights he has acquired.

F. B. Fleitas v. Consolidated Association of the Planters of Louisiana et als., 223.

5. Article 2446 of the Revised Civil Code provides that a contract of

MORTGAGE—Continued.

sale between husband and wife can take place only in the three cases which it mentions.

In this instance, the husband and wife had no right to contract in the manner attempted, and the mortgage sought to be enforced by executory process is utterly void.

The defendant erroneously contends that, as a third holder before the mortgage paper, resulting from this illegal contract, became due, he is not affected by said nullity.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper governed by the rule invoked by defendant.

F. S. Garner, Administrator v. Watson M. Gay and Sheriff, 375.

In 1835, the marriage contract between Mrs. Elizabeth Martin and John Dawson, which, it is claimed, contains a "constitution of dowry," was recorded in the book of donations in the office of the recorder of mortgages in New Orleans, and it is contended that this preserved the registry of the wife's mortgage on the property of her husband, and gives her the preference to the proceeds of his property over the other plaintiffs and contestants before this court.

Article 1541, Code of 1825, is invoked. It provides that: "When the donation comprehends property that may be legally mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered within the time prescribed for the registry of mortgages, on a separate book for that purpose, by the register of mortgages, which book shall be open to the inspection of all parties requiring it."

The object of this article is not to give notice of the wife's mortgage upon her husband's property for the protection of her dotal or other rights, but to operate as notice of the property donated, its status, and the inability of the donor, probably, or his creditors, to in any manner affect said property. It relates only to the property embraced in the act of donation, its title and character.

The wife's mortgage, as to her husband's property, existed without the registry, but when the system of this class of mortgages was changed, registry became necessary, and some of the modes prescribed for the registry of the various kinds of mortgages was essential. The registry of the marriage contract, in this instance,

MORTGAGE—Continued.

not being one of the modes prescribed, is not a compliance with the law on the subject. It did not operate or preserve a mortgage before the first of January, 1870, and there is no law giving it such effect since that date.

Because the function of the mortgage office and its records is to preserve mortgages, it does not follow that the direction to record an act of donation in a book of donations (conceding the marriage contract in this instance to be a donation), created and preserved a mortgage in favor of the donee—the wife. Mortgages, to be preserved and effective, as to third parties, must be registered in the book and in the manner prescribed by the law for that purpose. This was not done in this case.

Succession of E. Cordeviollé v. John Dawson. Maria Louise Remy v. The same. Mrs. Elisabeth Martin v. The same. Consolidated, 534.

7. This suit is brought on a judgment in which the original obligation was merged. In the authentic act by which the defendant acquired from Byrne, Vance & Co., his title to the real estate subject to the plaintiff's judicial mortgage, the defendant bound himself expressly to pay whatever amount Mithoff, the plaintiff, might recover against Byrne, Vance & Co., in a suit then pending and not finally determined. Thus, it was a condition of the sale to Bohn, that he should pay whatever judgment, if any, Mithoff should obtain in the court of last resort. The amount of such judgment, if finally obtained against Byrne, Vance & Co., was to constitute part of the consideration to be given for the property by Bohn.

The court is not able to see what interest or right the defendant can have in protracting this litigation on the pretense that confederate money was the basis of the contract originally entered into between Mithoff and Byrne, Vance & Co., and which culminated in a judgment.

William Mithoff v. Auguste Bohn, 566.

8. The court below did not err in refusing the intervenor the preference which she asserts, because her legal mortgage was not duly recorded in the mortgage office prior to the first of January, 1870. It was recorded in December, 1869, in the book of donations only. The fact that in the month of March, 1871, the book of donations was closed, and the same book was used thereafter as a mortgage book, can not benefit the intervenor, whose mortgage had already perished for want of registry in the mortgage book.
- That the plaintiffs had knowledge of the intervenor's tacit mortgage is of no consequence. Under numerous decisions of this court knowledge is not equivalent to registry.

MORTGAGE—Continued.

Article 123 of the State constitution does not impair the obligations of contract, and is not violative of the constitution of the United States.

E. Rochereau & Co., in liquidation, v. D. H. Delacroix—On third opposition of Mrs. Stephanie de Livaudais, wife of D. H. Delacroix, 584.

9. The plaintiff having a legal mortgage on a certain piece of land at the time of its being given to her by her husband, in payment of a valid debt which he owed to her, took said land free from defendant's mortgage, which was junior to her's, and which she could have disregarded in enforcing her rights, by the sale of said property, without giving good cause of complaint to said junior mortgagee.

Marie Elodie Perret, wife, etc. v. Bernard Sanarens and Sheriff, 593.

10. On the nineteenth of June, 1873, P. S. Wiltz obtained from the district court in St. Landry an order of seizure and sale against a certain piece of property. On the twenty-first, notice thereof was served on the plaintiff, administratrix of the estate of the deceased owner of the mortgaged property, and the seizure was made on the twenty-fourth of the same month, a keeper was put in possession and notice of the seizure served on the plaintiff and administratrix. The property was subsequently sold and adjudicated to P. S. Wiltz & Co. on the sixth September, 1873.

On the twenty-fourth of June, 1873, the probate court of St. Landry homologated the deliberations of a meeting of the creditors of the deceased convoked on the petition of the administratrix, and held on the twentieth of June, 1873. The judgment of homologation ordered the sale of all the property of the estate, including that in dispute here, and which was then actually in the jurisdiction of the district court. Under this order the said property was adjudicated to the plaintiff and administratrix on the thirty-first of July, 1873;

Held—That the mortgage creditor had the right to go into the district court to have the mortgaged property sold. That court having been seized of jurisdiction of the property, the order of the probate court was ineffectual to divest that jurisdiction, and the sale thereunder to the defendants and appellants was not the sale of the property of another, as contended by the plaintiff and appellee. On the contrary, the sale under the order of probate conveyed no title.

Julie Guilbeau, widow, etc. v. Pierre S. Wiltz et als., 600.

11. As a general rule the sale of property by the probate court trans-

MORTGAGE—Continued.

fers the mortgage from the thing sold to the proceeds in the hands of the administrator, but this applies only to the sale of the property of the deceased. In the case at bar, at least one-half of the mortgaged property belonged to the defendant, the surviving husband, and the value of this half exceeds the amount of the mortgage of the third opponent. The sale of defendant's property by the probate court certainly did not raise the mortgage of the third opponent thereon.

W. W. Harper v. H. Linman—Neith Lodge, Third Opponent, 690.

SEE PROMISSORY NOTES, No. 21—*Brooks v. Mrs. Stewart and Husband, 714.*

SEE LAWS AND STATUTES, No. 22—*Micou et al. v. Benjamin and Day, 718.*

SEE HOMESTEAD, No. 1—*Fuqua v. Chaffe & Bro., 148.*

SEE SEIZURES AND SALES, 6, 7—*Chaffraix & Agar v. Packardt et als., 172.*

SEE SEIZURES AND SALES, No. 11—*Riley v. Condran, 294.*

SEE SEIZURES AND SALES, No. 14—*O'Hara v. Folwell, 370.*

SEE BONDS, No. 10, 11—*Clements v. Biossat et als., 243.*

SEE BONDS, No. 15—*Parker v. Bernard, 275.*

SEE HUSBAND AND WIFE, No. 13—*Louisa Reich v. Rosselin et als., 418.*

SEE INTERVENOR, No. 6—*Webb v. Keller, 596.*

NEGOTIORUM GESTOR.

SEE ADMINISTRATOR, No. 19—*Rents et als. v. Cole, 623.*

NEW ORLEANS.

1. According to the twenty-fourth section of the present charter of the city of New Orleans, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said petitioners by a written petition addressed to the Council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into in accordance with said petition, to make the banquettes which they were legally bound to make.

The evidence showing that the work was well done and that the price charged was reasonable, it would be repugnant to every principle of law and equity to permit the plaintiffs to enrich themselves at the expense of others.

The law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved, and in whose front the banquetting is to be made.

NEW ORLEANS—Continued.

The constitutional objection to the twenty-fourth section of the city charter, on the alleged ground that it imposes a tax which is not equal and uniform, is not well taken. The court does not understand that any tax is imposed by said section, in the technical sense of the word. It merely requires each proprietor to pay for his banquettes, and authorizes them to indicate when the banquettes shall be made and the character thereof; and, in doing this, the Legislature does not violate any provision of the constitution.

Hermann Daniel et als. v. City of New Orleans, Page & Co. et als., 1.

2. The purport of all the regulations made in relation to the matter of drainage into the Carondelet Canal and the Bayou St. John, from the act of the Legislature of March 10, 1858, appears to be, that the city was prohibited from such drainage; or, if persisted in, that it should indemnify parties injured thereby—such indemnity to be ascertained by experts as damages. A report of such experts fixed the sum of \$500 per month in favor of the relator after the first of July, 1869, *so long as such drainage should continue*. The decision of this Court rendered in March, 1871, while the city was still draining into the Bayou St. John, limited the liability of the city to pay \$500 per month to the relator, for this draining privilege, to the end of his lease, which expires in April, 1878.

But that decree certainly did not bind the city to continue to drain into the Bayou St. John until the expiration of the relator's lease, whether it thought proper to do so or not. It was not bound to pay for a privilege after ceasing to use it and after having abandoned it in March or April, 1873, paying the relator up to that time.

The swamp back of the city is a natural reservoir which, in its turn, sends all its waters into the lake beyond, and if from natural causes any of those waters on their way to the lake are thrown back, so that through certain outlets connected with the bayou, which the plaintiff himself can readily close, a portion of the swamp water, freed from smell and noxious matters, for a limited period of time finds its way into the bayou, that state of things can not be called drainage by the city into the bayou.

State ex rel. Louis Gagnet v. Administrator of Public Accounts, 336.

3. The permission to erect a platform scales with a covering at the coal landing in the Second District, city of New Orleans, was granted to the plaintiffs by resolution of the City Council on the eighteenth of June, 1872, provided "that this permission be revokable at the pleasure of the council." The plaintiffs pray for an injunction to prevent the city from removing the platform and covering erected over it, and also sue for damages. After the trial in the court below, and after an appeal had been taken and the

NEW ORLEANS—Continued.

record filed in this court, the City Council, on the twenty-ninth of July, 1873, passed an ordinance revoking the permission granted to plaintiffs.

The judgment of the court *a qua* making the injunction perpetual is affirmed, with the proviso and understanding that said injunction must be treated and considered as resting alone upon the state of facts existing at the trial of the cause in the court below, and without prejudice to the city to set up a claim to the quiet and undisturbed possession of the place in controversy under any ordinance revoking the permit granted to plaintiffs.

Kendig & Co. v. City of New Orleans, 357.

4. The only question presented in this suit was decided in the case of *Marquez v. the city of New Orleans*, 13 An. 320. The court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the proprietors on the north side. That case and the one at bar seem to be identical.

Gabrielle Correjolles v. Succession of Louis Foucher, 362.

5. The cession to the United States of a certain lot of ground in the city of New Orleans, for the express and only purpose of erecting thereon a branch of the Mint of the United States, together with the necessary appendages, is not a *vente a remere*. It lacks one of the essentials of a sale—a price. Neither is the government of the United States, technically speaking at least, the usufructuary of the property. It has only the use of it—the tenure thereto being precarious, and the right to occupy the same restricted to such time as the government may see fit to occupy it for the purposes of a mint—the government having the right to remove the same, whenever it may see fit, upon the happening of either of which events, the use of the property would immediately revert to the city. *John Coleman & Co. v. The City of New Orleans*, 451.
6. A thorough examination of the question has led this court to the conclusion that the State has the power to grant to a railroad company the right of way through a street in the city of New Orleans.

New Orleans, Mobile and Chattanooga Railroad Company v. The City of New Orleans et als., 517.

SEE BILLS AND PROMISSORY NOTES, No. 11—*McCan v. McLauren & Co. et als.*, 344.

SEE ESTOPPEL, No. 3—*Kreider v. City of New Orleans*, 342.

SEE CORPORATIONS, No. 5—*New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans et als.*, 478.

SEE TAXES AND TAX COLLECTORS, No. 15—*City of New Orleans v. Klein*, 493.

SEE CORPORATIONS, No. 6—*Bowworth et als. v. City of New Orleans*, 494.

OBLIGATIONS AND LIABILITIES.

1. It is well settled that a coproprietor can not erect improvements on the common property and compel the other joint owner to contribute to pay for the same without the consent of the latter.

The defendant in this case contends that as Bayley, the plaintiff, sold him the undivided half of a plantation which he held in common with Pugh, "together with the undivided half of the buildings and improvements thereon," he sold him half of *all* the improvements, including those erected by Pugh, without plaintiff's consent; that this sale was virtually an election to take half of said improvements made by Pugh; that it was an implied promise to pay for half the value thereof; and that from this instrument an obligation arose binding Bayley to pay for half the value of said improvements, which are proved to be worth \$4000, wherefore defendant refuses to pay for the last two installments due on his purchase.

Pugh was not a party to the instrument, which is alleged to contain said implied election on his behalf. This court is of opinion that there was no such election, implied or express, in that instrument, and as the plaintiff, Bayley, was not bound to pay Pugh for the improvements, he incurred no obligation in favor of Denny, the defendant, on the payment by the latter of \$4000 to Pugh for half of the improvements.

Assuming that Bayley sold to the defendant the improvements erected by Pugh, which is denied, there is no eviction shown; consequently no obligation arising from warranty can be set up in defense of this action. Besides, when, as in this case, the purchaser is aware of the outstanding title of a third party, or the circumstances out of which the subsequent disturbance arose, he can not suspend payment of the price, nor require security against eviction.

On the trial the court *a qua* did not err in receiving the evidence offered to explain what improvements were intended by the parties to be sold—whether the improvements belonging to the joint ownership only, or whether also the improvements belonging to one of the coproprietors. The object of this proof was to ascertain the value of the subject to which the instrument refers.

George M. Bayley, Testamentary Executor v. David Denny, 255.

2. Clayton, Williams & Co. absconded after being permitted to draw from the Louisiana State Bank \$5000 on the forged checks which they had deposited in said bank for collection. They had a cash balance already to their credit.

If the advance had been made to Clayton, Williams & Co. after the certification of the checks, or if the plaintiff had parted with its money in consequence thereof, there would be no doubt as to the

OBLIGATIONS AND LIABILITIES—Continued.

liability of defendants. But it happens that the plaintiff paid out its money on the faith of the deposit of the forged checks, at least one hour and a half before the defendants gave the certification, or even had knowledge of the existence of the forged checks. The loss therefore was not the consequence of the certificate.

The plaintiff, holder of the forged checks, was promptly notified of the forging, as soon as discovered, and within six hours after the certification. Whether or not the plaintiff would have succeeded in capturing Clayton, Williams & Co., the forgers, and would have recovered the money, if the defendants had detected the forgery as soon as the checks were presented for certification, is not established with sufficient certainty to enable the plaintiff to recover, assuming that to be a good ground for recovering judgment, of which no opinion is expressed.

Louisiana State Bank v. Hibernia Bank and Germania National Bank, 399.

3. The defendant removed to the city of New Orleans a certain saw mill, engine and other fixtures, from mortgaged premises on which they stood. For which removal he is sued in damages by the plaintiff, who claims that he holds on the tract of land to which they were attached a vendor's privilege and special mortgage.

The removal was effected under the written authority of one of the owners of the property. Some time afterwards, said sawmill, engine and fixtures were purchased by the defendant, who had removed them in the manner above stated.

At the time of the sale to defendant, said objects were movable property and in no way affected by the mortgage.

The fact that the defendant was employed by the owner to remove the property, created no legal obligation against him in favor of the mortgage creditor, nor did his purchase of it subsequently have that effect.

M. H. Meyer v. A. Frederick, 537.

4. At a public sale made for the purpose of partition, the plaintiff, a possessor in bad faith, became the adjudicatee of two tracts, including the very land which he had possessed during twenty years, and which he had highly improved by clearing and otherwise.

Although the plaintiff has not been actually dispossessed, yet, as a question of law, such has been the effect of the sale and adjudication. In matter of eviction it is a well settled doctrine that actual dispossession is not always required. A purchaser may be evicted, although he continues in possession of the property, if that possession be under a different title, as for instance, if the vendee should subsequently hold under the true owner.

OBLIGATIONS AND LIABILITIES—Continued.

The same principle may be laid down with regard to the possessor in good or bad faith, whose works and constructions have been kept by the owner of the soil. Whether the latter appropriates them to his own individual use, or alienates them to the person to whom he owes the reimbursement, or to any one else, the case is the same. In the first and third hypothesis he retains or transfers that which is but conditionally his property; and, in the second, he transfers to the owner his own property; in the latter, the obligation to reimburse or refund can not be doubted.

The obligation of the defendants in this case is to pay the value of the materials and the price of the workmanship, without regard to the increase or decrease in the value of the soil. As the buildings were the plaintiff's property, the defendants' claim for their rent is unfounded.

The defendants' other claim for the rent of the land is also unfounded. The case is not one of letting and hiring. The claim is one in the nature of damages for the wrongful detention of property, and although the trespasser is not allowed to prefer a claim for the enhanced value of the soil, attributable to his improvements, yet in the admeasurement of damages, to which he is subject, the benefit derived from such improvements becomes an important element.

The defendants, Wright, Williams & Co., contend that, previously to the partition sale, they had parted with their interest in these lands. The answer to this is, that the partition suit was carried in their own name and for their individual benefit.

Milton Wilson v. J. P. Benjamin, et als, 587.

5. The presumption is that every one, capable of contracting, knows what an obligation is which he signs, and he cannot be relieved from the effects of his act by showing that he does not understand the language in which the obligation is written.

Vincent Boagni v. Victor Fouchy, 594.

6. The ruling in this case of the court *a qua*, permitting the introduction of parol proof that one McMichael never owned the property in dispute, and that Spiller did, was clearly wrong.

McMichael having sold the property in dispute to French, and received one thousand dollars cash in consideration for it, executed his bond for title, and French, taking possession of it, expended eight hundred dollars in repairs. There was no obligation resting upon McMichael further than to execute a deed when called upon. The property belonged to French to all intents and purposes, and whether McMichael objected or not to the subsequent probate sale of the property, as part of the estate of one Nancy Spiller, did

OBLIGATIONS AND LIABILITIES—Continued.

not in any manner affect the rights of French. Norris bought the property as belonging to said estate, and Bach bought it from Norris. After these transactions, French sued McMichael on his title bond, and cited both Bach and Norris as parties;

Held—That Bach had made himself liable, under the circumstances of the case, for the value of the rent of the property from the date of the service of the citation upon him in the suit of French against McMichael.

Mrs. Louisa French, Executrix v. John M. Bach et al., 371.

7. Michel, one of the defendants, in paying to Marchand, the holder of his negotiable note acquired before maturity, did, voluntarily, only what Marchand could have compelled him to do; and the plaintiff, who was defrauded of said note by his brokers, has no right to demand from him payment a second time. His recourse is against his unfaithful agents.

When one of two innocent persons must suffer, he whose act contributed to the loss must suffer rather than the other, who only discharged a legal obligation.

Jules A. Florat, Tutor, v. Alfred Marchand and M. F. Michel in solido, 741.

8. The defendants, merchants in New Orleans, were instructed to sell cotton and send the money to care of W. W. Robertson, Glencoe, Mississippi, by the steamer Belle Lee. Defendants put the money in a package directed as advised, and sent it by one of their clerks to be put on board the Belle Lee, then at the wharf in New Orleans, and about to leave port. Within a short distance of the boat the clerk was knocked down, and robbed, while in an insensible condition, of the money and his gold watch. No recovery was ever made of the money;

Held—That, under the circumstances of the case, the defendants should sustain the loss, because the money was in their custody and under their control when the robbery occurred. It was out of the plaintiffs power to prevent the act of the robber.

Parker & Co., for the use of, etc. v. J. P. Harrison, Son & Co., 751.

9. Where plaintiffs alleged that the first adjudication of a certain market vested in them the title to collect the revenues of said market, and that when, in defiance of this adjudication, the controller of the city of New Orleans sold it anew, and received \$2500 more than their bid, this sum of \$2500 belonged to them;

Held—That by the terms of the sale, the city authorities had reserved the right to reject any or all bids. The second adjudication was a rejection of the first bid, and as this second adjudication was

OBLIGATIONS AND LIABILITIES—Continued.

ratified by the council, it follows that the plaintiffs' claim for the difference between the first and second adjudications can not be maintained.

Batt & Michel v. The City of New Orleans et al., 754.

SEE BILLS AND PROMISSORY NOTES, No. 25—*Commercial Press v. Crescent City National Bank*, 744.

SEE BONDS, No. 4—*Edward Conery v. Cannon et al.*, 123.

SEE INSURANCE, No. 3—*Hardee v. St. Louis Mutual Insurance Company*, 242.

SEE SHERIFF, No. 2—*Gay v. Lejeune et als.*, 250.

SEE INSURANCE, No. 12—*Carroll & Co. v. Jackson Railroad Company*, 447.

OFFICE AND OFFICERS.

1. This case is not one in which the district attorney, acting as parish attorney, can claim under section 2761 R. S., "a fee of five per cent. on the amount, for defending" the said suit, as no amount was claimed or actually involved therein.

It is manifest that the above mentioned section contemplates some services to be rendered for which the salary—the minimum of which is fixed—should be a compensation, and it provides only for commissions when there is a suit by or against the parish for an amount on which the commissions can be assessed.

Josiah Fisk v. Police Jury, Parish of Jefferson, Left Bank, 20.

2. The city of New Orleans, like any other plaintiff, has the right to control its own judgments and *feri facias*, and had the right to cause those issued in these cases to be set aside, but by so doing, it could not deprive the clerk, who had properly performed his duties, of his legitimate costs.

The objection made to his being paid, because, instead of turning over the *feri facias* to the city attorney, as directed, he gave them to the sheriff, is not well founded.

The clerk, at the time was surrounded by a hostile body of men and driven by force out of the office to which he was by law entitled; under these circumstances, the court does not consider that, because the *feri facias* were sent to the sheriff's office at such a moment of tumult, for safe keeping, the clerk deprived himself of the right to claim the legal price of his work.

Thomas Lynne v. City of New Orleans, and E. T. Manning v. the same. (Consolidated), 48.

3. Where it was contended that, in a former proceeding before this court, while acting as clerk, of the Eighth District Court, Manning was published in this court for a contempt of its authority, and therefore that he had been recognized as clerk of said Eighth

OFFICE AND OFFICERS—Continued.

District Court, from which it follows that, having been recognized then, he must be recognized now;

Held—That this court takes cases as they are found and decides them upon the pleadings by which they are presented. In the proceeding referred to, Manning's right to office was not contested; in this case it is expressly put at issue. This court is therefore forced to declare whether he was, or not, entitled to the office when he took possession of it, and when the services for which he claims payment were made. *Ibid.*

4. The Attorney General has the right to designate an attorney at law to assist the attorney for the State, or to prosecute alone in certain cases. *State of Louisiana v. G. Russell*, 68.
5. The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office under his official seal.

Citizens' Bank of Louisiana v. Clarence L. James, 268.

6. This is a contest for office. The appeal should have been made returnable within ten days after the judgment. The appeal granted by the District Court was incorrectly made returnable on the second Monday of February, and when the error was discovered the appellant had a proper return day fixed according to law. The motion to dismiss the appeal can not prevail.

Plaintiff, alleging to be the sheriff for the parish of Madison, enjoined defendant from acting or assuming to act as sheriff, from possessing or attempting to possess the books, papers, and archives of the said office, and from intruding or attempting to intrude himself therein. The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception is well taken and should have been maintained. The injunction must be dissolved.

Enos M. Cramer v. Alexander V. Brown, 272.

7. The peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act under which this suit is brought is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873, is not well taken.

OFFICE AND OFFICERS—Continued.

There is no conflict between the essential provisions of the two acts; the only points of difference are that the later act is of a less general application and the proceedings under it of a more summary character. According to the return of both Returning Boards for the election held in November, 1872, the defendant was defeated. It is clear that the defense is without merit.

State ex rel. P. P. Carroll v. Philogene Jorda, 374.

8. The authority of the Governor to remove a tax collector and appoint a successor, has been expressly recognized by this court in the cases of Dougherty and of Dayrus, 25 An. No reasons can be seen for reversing these decisions.

State of Louisiana ex rel. D. A. Weber v. C. L. Fisher, 537.

9. The relator, in this case, was duly elected or appointed to the office he claims on the second of December, 1872, in the only manner then known to the law. The act of the Legislature of March 9, 1874, changing the mode of appointment, can not be construed so as to make it retroactive. It must be understood to apply to parishes where appointments to that office had not been made by the police juries, or where vacancies existed.

In this instance the office of district attorney *pro tempore* had been filled, and the incumbent's term of office had not expired. The act of March 9, 1874, does not abolish the office of district attorney *pro tempore*, but only alters the mode of appointing to that office.

State ex rel. L. B. Olaborn v. Charles Parlange, 548.

10. The absence of the Governor from the State for a few hours, or a few days, creates no vacancy in the office, and does not authorize the assumption of the duties, prerogatives and emoluments thereof by the Lieutenant Governor during said absence. It must be, under a proper construction of article 53 of the constitution, such an inability to discharge the duties of the office, as well as such absence from the State as would affect injuriously the public interest.

It is manifest that the absence of the Governor from the State is to be ascertained on some proof accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as Governor of the State. There being no provision of law for the mode in which the Governor is to manifest to the public his absence from the State, it is necessarily left to his discretion, subject to his responsibility to the people.

This court does not think that it was ever contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor or Speaker of the House of Representatives should slip into his seat the moment he stepped across the borders of the State.

State of Louisiana ex rel. H. C. Warmoth v. James Graham, Auditor, 568.

OFFICE AND OFFICERS—Continued.

11. In this suit under the intrusion into office act, the clear explicit language of the twelfth section of the act of the Legislature of the twenty-first of March, 1874, declaring that the mayor of the town of Homer shall receive a salary of five hundred dollars a year, with no other fees or emoluments of office, and the other portion of said statute authorizing the mayor to act as justice of the peace, can not, under the allegation that as justice of the peace, he is entitled to fees, be so construed as to give jurisdiction of the case to the district court.

State ex rel. L. A. Cormick v. S. R. Richardson, 631.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676.

SEE LAWS AND STATUTES, No. 2—*Master and Wardens of the Port of New Orleans v. R. W. Foster*, 105.

SEE MANDAMUS, No. 4, 5—*State of Louisiana ex rel. Merle v. Dubuclet*, 127.

SEE TAXES AND TAX COLLECTORS, Nos. 7, 8, 9—*Simmons and Leroy v. Boullt*, 277.

SEE SHERIFF, No. 5—*Adams v. Dinkgrave*, 626.

PARTNERSHIP.

SEE SUCCESSION, No. 2—*Netter v. Herman & Lery*, 458.

SEE ACTION, No. 12—*Mangrum v. Norsworthy*, 640.

PARTITION.

1. The objection that the partition among certain heirs is void, on ground that it was not evidenced by a written act, is unsound, when they went into possession and were permitted to prove by parol the division or partition.

If it be granted that a partition is virtually a sale of each heir to the others, of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection.

John W. Johnston v. Gustavus and Hypolite Labat, 159.

2. The partition of succession property, real and personal, can be considered a no more solemn act than the transfer of real property, which may be proved by propounding interrogatories, as was done in this case. Therefore the exception to the interrogatories was not well taken, on the ground that no act of partition can be proven under the law, except by a written act of partition signed and executed by the parties thereto.

A. L. Gurman et als. v. Mrs. Zulme E. Hearsey and Husband, 251.

3. The motion to strike out certain specified portions of defendant's answers, as being irrelevant and contradictory, can not be maintained. The object of the interrogatories was to prove a partition

PARTITION—Continued.

by the mutual consent of all the heirs, and to establish the consent of the respondent thereto. She certainly had the right to state all the conditions and stipulations of the alleged agreement and the facts upon which her refusal to complete it was based. Such matters are closely linked to the facts on which she was interrogated, and they related to the very gist of the controversy. They are not irrelevant, nor are they contradictory, when taken all together. *Ibid.*

4. The defendant objected to the introduction of her answers until the plaintiffs had first shown that actual delivery of the property was made under the alleged partition. The answers were properly received. It is a rule of practice under our jurisprudence not to control a party in the order of introducing his proofs. *Ibid.*
5. The defendant's objection to any parol evidence to contradict her answers to interrogatories on facts and articles is well taken. The plaintiffs' action is based on the theory that the partition is a transfer or exchange of real estate, and it is well settled that the answers of a party to interrogatories propounded to prove such transfer or exchange, can not be disproved or contradicted by parol. *Ibid.*
6. The same objection was properly taken to the parol evidence to prove a partition "of the movable property mentioned in each lot." The partition of a succession is the division of the effects of which the succession is composed, among all the co-heirs, according to their respective rights. In this case the succession was composed of real and personal property and rights, and the partition was intended to be of such property and rights as a whole or mass, and the evidence should be that which is necessary in relation to real property.

The proof of the delivery of real property is not confined to written or documentary evidence. *Ibid.*

7. Nothing prevents the owners of property in common from exercising their rights of partition, and it is not seen how the proceedings complained of in this case by plaintiff can injure her right of mortgage on the property which the owners have taken measures to partition, as her judicial mortgage will follow the property or its proceeds.

Mrs. Elise Labauve v. Mrs. Emily Woolfolk et al., 440.

8. In this case, two lots with buildings thereon were owned and held in common by two different persons, and, at the partition, nothing being said as to the dividing line, the parties (one of whom a minor whose tutor the plaintiff is) must have considered the limits to be

PARTITION—Continued.

defined by the buildings on each, which constituted a double cottage, and this state of things continued, without complaint, for about three years thereafter, when the plaintiff assumed to establish a line for himself without notice to his neighbor aforesaid, by tearing down a portion of the buildings which he alleged to extend over the minor's lot some nine feet, and took an injunction to prevent defendant's interference. The evidence does not sustain the injunction, and defendant claims damages. It is not thought, however, that the minor should be responsible for the illegal acts of his tutor. In such capacity he could have protected and exercised the rights of the minor in a legal manner. As the plaintiff is not before this court individually, all that can be done is to dissolve the injunction, reserving defendant's rights.

P. Lyons, Tutor v. J. C. Dobbins, 580.

SEE EVIDENCE, No. 36—*Fleming & Baldwin v. Scott and Ida Watson*, 545.

PAYMENT.

1. Whether Hatch, the United States collector of customs at the port of New Orleans, continued after secession to act in the same capacity as before, or whether he became collector of customs for the Confederate States, it is not important to decide in this case, as in either event the payment of duties to him should protect from seizure the property on which the duties were paid.

If Hatch had ceased to represent the Government of the United States and represented the Confederate States, the payment should protect the property, as it was made to the representative of a power which had the ability to enforce its demands, and which the United States, for the time being, were unable to resist.

Samuel Snodgrass v. Thomas A. Adams, 235.

2. The plaintiff claims the value of a carriage and harness he purchased from defendants and left with them on storage. He had paid a portion of the price in cash, and for the balance gave the defendants a note of J. B. Hood to the order of and indorsed by plaintiff, which was taken as a payment of the bill for the carriage, and a receipt in full given. The note was paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights they had no authority to sell the plaintiff's property which was stored with them subject to his order.

James Longstreet v. R. Marsh Denman & Co., 381.

SEE TRANSFER OF PROPERTY, No. 1—*De Greeck & Co. v. Murphy et al.*, 226.

PLEADINGS.

1. Plaintiff, after having accepted the benefit and status conferred upon him by Pierre Monette in the act of marriage which legitimated him, can not attack the act creating his own status, and under which he is asserting his rights, by questioning the validity of the same rights conferred upon one who is recognized as his brother and also legitimated in the same document. The very words which establish the legitimacy of plaintiff, establish also the status of the defendant. He can not accept the benefits of an act and repudiate its obligations.

Succession of Pierre Monette, 26.

2. The demand set up by the defendants in this case is, in its nature, independent from the action brought by the plaintiffs, and should therefore be considered as a principal, and not a reconventional demand.

J. C. Murphy & Co. v. McCarthy & Finnerty, 38.

3. The defendants in injunction took a bill of exceptions to the permission granted by the court *a qua* for an amended petition to be filed by the plaintiff on the ground that the suit being an injunction one, all the matters of law or fact that can justify the issuing of such process could and should only be alleged and pleaded in the original petition.

The ruling of the court was correct. The amended petition contained only the plea of prescription which may be pleaded at any stage of the proceedings.

O. K. Hawley, Public Administrator and his successor J. M. Wells v. Crescent City Bank et als., 230.

4. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

5. It is idle for the defendant to set up that the title of the property claimed of him is in Jacob Whetstone individually. who brought this suit as administrator, and not in the successions whose representatives are before the court, and therefore that, if he pays over the money under the judgment appealed from, he may be held liable to Whetstone hereafter. Jacob Whetstone and the other parties acting jointly with him when they consigned to defendant the cotton whose proceeds are now claimed, are bound by their judicial admissions that the money belongs to said successions. The defendant, therefore, runs no such risk as he anticipates.

PLEADINGS—Continued.

The plea of prescription of three and five years is not well founded.

The action does not arise *ex delicto*, but from a *quasi contract*.

Under the settled jurisprudence of this court, no damages can be allowed where the appellee joins in the appeal, however frivolous it may be.

Jacob Whetstone, Administrator v. S. W. Rawlins, 474.

6. The exception to the petition on various grounds having been pleaded after default had been entered, was correctly dismissed by the judge *a quo*. *George Wood v. Charles Harispe*, 511.

7. The plea that the suit is premature should have been filed in *limine litis*. It was too late after answer filed.

Cooley & Phillips v. P. Esteban et als., 515.

8. Where the suit is brought to recover from defendants the amount of five notes given by them in payment of the lease of certain property and where, when the suit was instituted, there was already an action pending in another court, between these defendants and plaintiffs, to annul said lease and cancel said notes, the plea of *lis pendens* is a good one and should have been maintained.

A. Rochereau & Co., Agents v. Mrs. Bertha Lewis and Husband, 581.

9. The objection set up in a motion in arrest of judgment, that Charles W. DuRoy, who filed the information as district attorney *pro tempore*, was not appointed to that office and consequently that his official act was a nullity, came too late. If the exception is a good one, it should have been pleaded before going into the trial. Besides, in a motion in arrest of judgment, only errors fatal on the face of the record can be examined.

State of Louisiana v. Aladin Nunes, 605.

10. Where the dative testamentary executor contended that none of the issues raised in a supplemental petition of opposition of the ninth August, 1873, to his tableau and final settlement, could be entertained by the court, because before that, to wit: on the fourth of August there was judgment homologating all the items not opposed:

Held—That as the original petition opposed in general terms the homologation of all the items of the account, except the law charges and costs, it follows that only these items were homologated by the judgment of the fourth of August, 1873. The supplemental petition of the ninth of August supplies, so far as the items therein specified, the deficiency complained of in the original petition of opposition. It cures to that extent the objection of vagueness. The court *a qua* erred therefore in dismissing the opposition.

Succession of Pierre Cabrol. Opposition of Marie Nezat, 609.

PLEADINGS—Continued.

11. The defendants are sued as sureties, bound *in solido* which they deny. After the case had been tried and submitted, but before judgment, the defendants offered to file the plea of division. This was objected to on the grounds that it came too late, and that many of the co-sureties were then insolvent. The plea was properly refused by the judge *a quo*.

Division is a right accorded to sureties, but they can not claim this benefit while denying their obligation as surety; the plea is inconsistent. The obligation sued upon in this instance is manifestly one of suretyship, and solidarity is of the nature of that contract.

Thomas B. Kilgore v. John L. Tippit et al., 624.

12. The defendant is bound by the pleadings he filed through his counsel. Without disavowing the authority of the pleadings, he can not come into court, two years after he has raised the issue of payment, which admits the debt, and shift his defense by setting up an inconsistent plea—a denial of the indebtedness.

A litigant will not be permitted to shift his position in order to escape the consequences of his solemn judicial admissions standing on the record for nearly two years.

A. L. Gervin v. J. H. Beaird, 630.

13. Where, in defense of the action, it was alledged by the advocate appointed to represent the debtor who absconded, that the property attached, although in the name of the defendant, was in reality the property of a commercial firm of which defendant was a member, and that partnership property could not be attached:

Held—That it would be time enough to pass upon this defense, when made by some one having an interest to make it, to wit: one of the partners, or a creditor of the firm, if there be a partnership.

Andrew J. Williams, v. E. F. Williams, 644.

14. The plea of payment and that of novation are inconsistent. A debt paid can not be novated. There is nothing to novate.

Hoss & Elder, Administrators, v. George J. Jones, 659.

15. The argument, on behalf of the sureties, that they can not be condemned to pay, because the recorder did not obtain their written consent to the appointment of the deputy, as provided by law, can not avail one of the securities who is himself the deputy. As to the other the matter should have been specially pleaded. It is raised for the first time, in this court, under the general issue.

J. H. Brigham, Curator v. A. L. Bussey et al., 676.

16. The plea of *lis pendens* is not well founded. The plaintiff is not shown to have acquired the note from the payee after maturity, and therefore the equities pleaded are not available. The account or indebtedness of the payee to the maker of the note in a suit

PLEADINGS—Continued.

pending on appeal; can not compensate the note held by the plaintiff, even though she acquired it after due.

Mary Woods v. J. Viosca, Jr. and Joaquim Viosca, 716.

SEE EVIDENCE, Nos. 16, 17, 18—*Boedicker v. John East et als.*, 209.

SEE CONTRACT, No. 4—*Citizens' Bank of Louisiana v. James*, 264.

POLICE JURIES.

1. The work, for which payment is claimed in this case, was adjudicated by one of the inspectors of roads and levees in the parish of Pointe Coupee; but it is not shown that the police jury ever authorized the work, and that they provided funds necessary to pay for the same in the ordinance creating the debt. This objection is fatal.

E. K. Branch v. Police Jury, parish of Pointe Coupee, 150.

2. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector v. Charles McVea, 151.

3. The ordinance of the police jury of the parish of Concordia, which provides for the levying of a special tax to be known as a contingent tax, to be appropriated to the payment of all warrants drawn on the same for the payment of attorney's fees—any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same, is violative of the 2745th section of the Revised Statutes.

In so much as concerns the payment of attorney's contingent fees, it will be time to levy and collect a tax to pay the same when the contingency which may make them due, shall have arrived. The contingency may never happen, and there would then have been no necessity for collecting the tax.

Nathan Lorie v. Bennett Hitchcock, Tax Collector, et al., 154.

4. The police jury of the parish of Rapides is a political corporation of limited powers. Under authority to clear the banks of navigable rivers "for the purpose of securing a free passage for boats and other small river craft," R. S. sec. 2743, the police jury can not remove nor break up the woodyard of the plaintiffs, established years ago, and which in no manner interferes with the free navigation of Red river.

The police jury has authority to control the roads of the parish, Revised Statutes, sec. 3364, but the ordinance complained of does not profess to have been passed, and obviously was not passed in

POLICE JURIES—Continued.

the exercise of this power. Besides, a sufficient ground to defeat the pretensions of the police jury is that they have no authority to deprive plaintiffs of the right to pursue their occupation as keepers of a woodyard, which is not alleged to encroach on any public road.

William L. Morgan & Co. v. Police Jury of the Parish of Rapides, 281.

SEE CORPORATIONS, No. 2, 3—*Stephen C. Sterling v. Parish of West Feliciana*, 59.

SEE TAXES AND TAX COLLECTORS, Nos. 7, 8, 9—*Simmons & Le-roy v. Boult*, 277.

PRACTICE.

1. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does not come under the exceptions contained in the 494th article of the Code of Practice.

More than a year having elapsed from the last payment of interest to the institution of this suit, the usurious payments which were expressly imputed by the parties to the interest can not now be recovered back, nor imputed to the capital.

James McCracken, Administrator v. James Madison Wells, 31.

2. This is an injunction suit, in which the plaintiff alleges that the judgment under which execution issued is a nullity, on the ground that there is no legal corporation plaintiff therein, or owner thereof, such as the Accommodation Bank.

There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in the original suit. Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence it is *res judicata*.

Francis C. McMillen v. Accommodation Bank et als., 34.

3. It has been so often decided that a defendant may release on bond the sequestration of his property that it can no longer be considered an open question.

The right to appeal from the order refusing this right is equally well settled.

State ex rel E. Taylor v. Judge of the Superior District Court, 65.

4. It is not true that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered *ex officio* by the court under article 274 can not be thus released.

Ibid.

5. Article 279 C. P. means what it says. Its terms are general.

PRACTICE—Continued.

Except in cases of failure, any sequestration may be released on bond. Were the meaning of article 279 doubtful, a liberal construction would be given to it, because the article is remedial in its character. *Ibid.*

6. A rule was taken by plaintiff on the garnishee in this case to show cause why he should not pay a certain judgment against defendant, because he had in his possession, notwithstanding his negative answer which was alleged to be false, property, rights and money of defendant to pay said judgment, and the garnishee on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in vacation. The exception was overruled, and the garnishee filed an answer in which he prayed for a jury. The exception should have been maintained; the issues presented were such as should have been submitted, if desired, to a jury.

A. O. Denouvion v. Rebecca A. McNight—W. O. Harrison, garnishee, 74.

7. The affidavit on which the writ of provisional seizure issued in this case is insufficient. It was made by a person not shown to be one of the parties, or their attorneys, or a party to the suit.

The affidavit authorized and prescribed by the law is one made by the party or his attorney. One made by any other person is not authorized by the law, and, as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

S. Fernandez & Co. v. Elias Miller, 120.

8. An auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

Myra F. Minor v. James L. Barker, Auctioneer, et als., 160.

9. A rule by the relator was taken in the court *a quo* to show cause why her opposition to the homologation of the report of certain experts should not be maintained, and an order of sale be rescinded. On trial, the opposition was dismissed, and the application to rescind the sale discharged. The judge *a quo* refused to grant an appeal. Among other reasons for it he alleged that these orders are merely interlocutory, and can not operate an irreparable injury. This is an error. The facts are such as to entitle relator to an appeal.

State ex rel. Mary B. Caldwell v. The Judge of the Fourth District Court, parish of Orleans, 161.

PRACTICE—Continued.

10. A writ of attachment can be dissolved by exception as well as by rule to show cause. This course is pointed out by the 258th article of the Code of Practice, which declares: "If the defendant, thus made a party to a suit, appear after having been served with the citation, or prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defense as in ordinary suits."

The exception in this case was in writing, and this is the notice required by law. Defendant might, under the practice which has grown up since the Code was adopted, have taken a rule to show cause, but there is no reason why he should not pursue the course pointed out by the written law, instead of that which convenience has made customary.

Charles A. M. Pouts v. Auguste Reggio, 305.

11. On the day of trial the sheriff had not made his return as to a subpoena issued for a witness on behalf of the defendant. A motion for a continuance on this ground was overruled. The case, however, was continued until the following day, when the sheriff made his return that the witness was not to be found. The application for a continuance should have been renewed after the return of the sheriff. This not having been done the court *qua* did not err in proceeding to trial. *State of Louisiana v. Jacob Turner*, 390.
12. The judge *quo* erred in making absolute the rule for the appointment of a receiver in this case. The petition on rule does not aver a necessity for it, nor any loss, injury or damage likely to arise to plaintiff, if it should not be done. There is no reason why the entire revenues of all the property belonging to the litigants should be taken possession of by a receiver, on the ground that the plaintiff owns one-fourth of it, when said plaintiff fails to allege even a cause for such appointment.

Mary Malady v. William Malady et al., 438.

13. When a reconventional demand has been filed, the plaintiff is bound to take notice of its trial and of all adverse defenses set up in the cause which he himself has commenced against his adversary. In this case a jury was prayed for by defendant. The case was tried without a jury. No bill of exceptions was taken by plaintiff to the trial, and no opposition to the trial without a jury was made by either party. Under such circumstances, this court will presume that a trial by jury was waived.

Fritz Huppenbauer v. Louis Durlin, 540.

14. The continuance of a cause comes within the sound legal discre-

PRACTICE—Continued.

tion of the judge, and the facts upon which he proceeds in the exercise of that discretion do not come within the review of this court.

State of Louisiana v. Sam Johnson, 543.

15. When the district court had before it sufficient authentic evidence to justify an order of seizure and sale, if there were irregularities in the advertisement of the property, they are not to be corrected in an appeal from said order.

Mrs. Emile Hoa v. Mrs. Mary Olancey, 557.

16. The form of certificate to the return of a commission to take testimony is not sacramental, and it is sufficient if it appear in the return, when and where and by what authority the deposition of the particular witness was taken.

An affidavit that the district judge was absent from the parish is sufficient under the law to authorize the parish judge to grant the order of the district judge for taking testimony.

Lambert B. Cain, Liquidator v. Solomon Loeb, 616.

17. The judge *a quo* did not err in not allowing the defendant to open and close the argument. This right belongs to the plaintiff in injunction. Neither did he err in permitting the plaintiff to call for papers necessary to make out her case, after the entry had been made on the minutes that the testimony was closed. This was a matter entirely within his discretion.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 651.

18. The judge *a quo* did not err in refusing to allow the defendant to submit her pretensions on her reconventional demand to a jury. The suit being on a promissory note and no fraud being set up as a defense, no jury was allowed by law to try the issue. Reconvention is an incidental demand. If the principal action could not be submitted to a jury, neither could that which was an incident thereto. *Margaret S. Pool v. Annie Alexander and Husband*, 669.
19. It is too late to enter a remittitur after an appeal has been granted. After the judgment was signed, it could only be corrected on appeal. *Ibid.*
20. It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

Succession of Alexander McDonald, 590.

SEE EVIDENCE, No. 31—*Higgins v. Haley*, 363.

SEE CRIMINAL LAW, No. 12—*State v. Bower*, 383.

SEE CRIMINAL LAW, Nos. 13, 14—*State v. Shonhausen*, 421.

SEE BILLS AND PROMISSORY NOTES, No. 13—*McStea & Value v. Warren & Crawford*, 453.

SEE TAXES AND TAX COLLECTORS, Nos. 12, 13—*City of New Orleans v. Rawlins*, 470.

SEE ACTION, No. 1—*J. C. Murphy & Co. v. McCarthy and Finnerty*, 38.

SEE INJUNCTION, Nos. 6, 7, 8, 9—*A. W. Walker v. E. Villavaso*, 42.

SEE BILLS OF EXCEPTIONS, No. 1—*State of Louisiana ex rel. Garthwaite et al. v. Judge of the Fourth District*, 66.

PRESCRIPTION.

1. The prescription of two years pleaded in defense of this case applies to acts of omission and commission, misfeasance, nonfeasance, etc., of the sheriff, as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. The defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

2. The evidence shows that the defendant never objected to the incorrectness of the account rendered to him until after the institution of this suit on said account. It is an account stated; *compte arrete*. The prescription of three years does not apply to such an account.

Jules A. Blanc v. S. O. Scruggs, 208.

3. The prescription of one year to this action of nullity is properly invoked. The argument of the administrator that prescription only began to run when he discovered the alleged fraud practiced upon him, can not be of any avail, as he was bound in law to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care.

William L. Cushing et als. v. S. L. Harmonson et als., 214.

4. Two of the mortgage notes of the defendant, held by the bank, plaintiff in this case, were about to prescribe, when, in order to avert this loss and to recover the claim, the attorney for the bank presented the petition to the person in possession of the office of the clerk of the court and acting as such, and caused due process to issue. This was sufficient to interrupt prescription.

The clerk was a *de facto* officer and his official acts were valid, however indifferent his title to the office.

New Orleans Canal and Banking Company v. Linn Tanner, Administrator, 273.

5. It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

Widow Anatole Villere v. Succession of Hughes Villere, 380.

6. The prescription of one year was pleaded in bar to the opposition made to the administrator's tableau, on the ground of usurious interest being charged on certain notes placed on said tableau. The plea should have been entertained.

Succession of Thomas F. Ostrander, 450.

7. The prescription of three years does not apply to a particular indebtedness in gold which is evidenced by a receipt and which is

PRESCRIPTION—Continued.

promised to be paid on demand, and if it came in the category of money loaned, prescription would only commence to run from demand. In the absence of proof to the contrary, the demand must be assumed to have been made only when his petition was served.

J. M. Pool v. L. Fontelieu, Public Administrator, 613

8. The instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, but not of one year, would be applicable.

Peter James v. Mrs. M. J. Lewis and Husband, 664.

SEE CRIMINAL LAW, No. 15—*State v. Tinney*, 460.

SEE RES JUDICATA, No. 4—*Succession of Jean Marie Sarniquet*, 419.

SEE DONATIONS, No. 4—*Wade v. Eames*, 449.

SEE PLEADINGS, No. 5—*Whetstone v. Rawlins*, 474.

SEE BILLS AND PROMISSORY NOTES, No. 14—*Spearing & Co. v. Succession of Zacharie*, 496.

SEE AUCTIONEERS, No. 2—*State v. Blohm et als.*, 538.

SEE EVIDENCE, No. 38—*Petetin v. Boagni*, 607.

SEE BONDS, No. 10—*Clements v. Biossat, et als.*, 243.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676.

SEE DAMAGES, No. 1, 2—*Campbell v. Miltenberger*, 72.

SEE DAMAGES, No. 5—*Wood v. Harispe*, 511.

SEE TAXES AND TAX COLLECTORS, No. 2—*Dunlop & McCance v. Minor*, 117.

PRIVILEGE.

1. Another fatal bar to plaintiffs' right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was recorded eight days after it was made, and two days after this suit was instituted. Therefore, plaintiffs had lost their privilege as to the intervenors.

H. M. Horrell & Co. v. H. N. Parish, 6.

2. A contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral not transferred or delivered in pursuance of said contract or promise.

Succession of A. H. D'Meza, 35.

3. The recording of a privilege too late, is equivalent to not recording it at all, so far as the seizing creditors are concerned; and recording it after the property upon which alone it can be executed has been seized and taken possession of by the sheriff and thus put away from the control of the defendant, does not affect the seizing creditor's rights.

Lapene & Ferre v. Edward Meegel; John H. McKee v. Edward Meegel—Consolidated with interventions and third oppositions of Greve, Wilderman et als, 80.

PRIVILEGE—Continued.

4. It is well settled that men who furnish materials have no privilege, if the contractor with whom they dealt had none.

The acknowledged account of plaintiffs against Allison, the contractor, did not give them a privilege on the property of defendant, for whose buildings Allison had bought materials from them. At most it only entitled them to such privilege as Allison might have. Having failed to record his contract, Allison had no privilege; consequently the plaintiffs are in the same category.

Whatever sum the defendant may have in her hands, due on her contract with Allison, after deducting the amount expended to complete the buildings subsequently to Allison's abandonment of his contract, belongs to Allison, and it certainly can not be distributed among his creditors in this proceeding, because he is not a party.

The plaintiffs, who are creditors of Allison, have shown no authority from him to collect from defendant whatever sum she may owe on a final settlement.

Baker & Thompson v. Mrs. A. L. Pagaud, 220

5. This suit was instituted to enforce the vendor's privilege on certain barrels of flour shipped for Liverpool, for which the whole price had not been paid. The Citizen's Bank intervened, claiming the control of the property by virtue of the bills of lading upon which it had made advances to the shippers. In this court the bank pleaded specially the want of registry necessary to preserve the plaintiffs' privilege. The plaintiffs objected that the question was not raised in the lower court, and that as, under article 805 C. P., the Supreme Court can only execute its jurisdiction in so far as it shall have knowledge of the matters argued or contested below, the point can not be urged here.

This objection is not well founded, because the matter contested below was the privilege claimed by the plaintiffs, and as they have failed to show that they have preserved their privilege in the manner prescribed by law, they can not enforce it to the prejudice of the intervenor, holding the evidence of title.

Glover & Odendahl v. George B. Shute. Citizens' Bank of Louisiana intervenor, 350.

6. As to third parties, privilege can have no effect unless duly recorded. This is the settled jurisprudence of this State since the adoption of the constitution of 1863. There is, in this instance, no evidence of the registry of any privilege in favor of the intervenors. It is not necessary therefore to discuss the effect of the possession of the railroad receipt for the cotton on which a privilege is claimed.

*Fargason & Olaj v. W. B. Johnson & Son—John Williams & Sons, Intervenor*s, 501.

PRIVILEGE—Continued.

7. Plaintiff claims a privilege on the buildings which he and his partner, now deceased, erected on a certain piece of ground to which neither of them claimed title, and for the erection of which he paid bills to a certain amount. But this the law does not allow. He stands in the position of a partner who has advanced his partner's proportion towards the construction of certain buildings. It is not to parties occupying such relations that privileges are given.

J. M. Pool v. L. Fontelieu, Public Administrator, 613.

8. It is false doctrine to say that, where a factor who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege rests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 651.

9. Tobacco, pipes, whisky, cards, perfumery, etc., are in no sense supplies necessary to make a crop. For such supplies the law allows no privilege.

S. Q. O. Stafford, Tutor, v. William L. Pearson and R. F. Williams, 658.

10. When the act of sale contains the pact *de non alienando*, no matter through how many hands the property sold has passed, so long as the price agreed to be paid remains due, the vendor has the right to proceed directly against the vendee, regardless as to who is in possession of the mortgaged premises.

The fact that the property was not divided into lots of fifty acres or less, according to article 132 of the constitution, is not sufficient cause for annulling the sale on the relation of the plaintiff, who complains of the illegality of the executory proceeding under which it took place.

Thomas B. Stevens v. Ed. F. Pinneo et als, 617.

SEE TAXES AND TAX COLLECTORS, Nos. 1, 2—*Dunlop & McCance v. H. D. Minor, 117.*

SEE HOMESTEAD, No. 3—*Succession of Wm Cooley, 166.*

SEE SEIZURES AND SALES, No. 13—*Wang v. Spencer Field, 349.*

SEE CORPORATIONS, No. 8—*Eddy v. City of Shreveport, 636.*

SEE OBLIGATIONS AND LIABILITIES, No. 3—*Meyer v. Frederick, 537.*

PROHIBITION.

1. It is well settled that this court will not exercise a supervisory control over the district courts, and that the writ of prohibition

PROHIBITION—Continued.

will not be used except in aid of the appellate jurisdiction of this court. Relators have mistaken their remedy in this instance; it is not a writ of prohibition, but an appeal from the order of the Superior District Court, ordering the transfer of the suit of relators from the Sixth District Court to that court.

State ex rel. Semmes & Mott v. The Judge of the Superior District Court, parish of Orleans, 146.

PROMISSORY NOTES.

SEE BILLS AND PROMISSORY NOTES.

PROTEST AND NOTICE.

1. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and the evidence in this case supporting the legal presumption resulting from the acceptance of the draft, that the drawer, either had funds in the hands of the acceptors, or, at any rate, had reasonable grounds to expect that their draft would be honored, said drawers were entitled to notice of dishonor, and on failure thereof were discharged from liability.

John A. Eastin v. Succession of William H. Osborn, 153.

2. From all the evidence on record in this case it results that the defendants, when they drew the draft sued upon, had a just right to believe that it would be duly honored. Therefore, they were entitled to due protest and notice of the dishonor of the bill. With regard to the promise of payment alleged to have been made by the defendants, it was coupled with conditions which were not accepted, and for that reason it can not entitle the plaintiffs to recover.

L. H. Gardner & Co. v. J. J. McDaniel & Co., 472.

3. The defense in this suit based upon a promissory note is: That the defendants are not personally bound, as they acted as a committee in behalf of the Butchers' Benevolent Association.

The note reads thus: "The Butchers' Benevolent Association *v.* The Crescent City Live Stock and Slaughterhouse Company, No.—, Sixth District Court, parish of Orleans. We, the undersigned, hereby bind ourselves to pay *in solido*, to Cooley & Phillips, attorneys at law, the sum of one thousand dollars, as soon as the above styled suit shall have been finally decided, being for professional services to be rendered by said Cooley & Phillips to the plaintiffs in the above suit." Signed, Paul Esteban, J. T. Aycock, Dague Verges, special committee.

This court thinks the signers of the obligation sued upon, bound themselves to pay the sum promised. There is nothing ambiguous in the written obligation; but if, by any perversion of language, the phrase "*we, the undersigned, hereby obligate ourselves to pay,*"

PROTEST AND NOTICE—Continued.

could be made to mean the *Butchers' Benevolent Association* obligated themselves to pay, this court would then be at a loss to know the sense of putting the words *in solido* in the obligation.

Besides, it appears from the evidence that the plaintiffs required that their fees should be *secured*. Of course, the Association's obligation was not *secured* unless the defendants were personally bound. The plea that the suit is premature should have been filed *in limine litis*. It was too late after answer filed.

Cooley & Phillips v. P. Esteban et als., 515.

SEE BILLS AND PROMISSORY NOTES, No. 3—*Samuel Jamison v. J. H. Pothaus et als.*, 63.

SEE BILLS AND PROMISSORY NOTES, No. 19—*Johnson v. Flanagan et al.*, 689.

RES JUDICATA.

1. The plea of *res judicata* is not tenable when the decree referred to in support of the plea declares that a judgment of nonsuit is rendered. *John A. Eastin v. Succession of Wm. H. Osborn*, 153.
2. The plaintiff sues to have defendant declared the father of her illegitimate child and to have him condemned to pay a certain sum for alimony to said child. One of the pleas of the defense is *res judicata*. There was a previous suit between the same parties for the same cause of action in the Fourth District Court, parish of Orleans, with the exception that, in said suit, the plaintiff had also claimed damages on the ground of injury done to her character and reputation by seduction. There was judgment, on the twenty-eighth of February, 1872, dismissing the claim of the minor child for alimony; and, on the next day, twenty-ninth of February, the claim of the mother for damages having come to trial before a jury, was dismissed on motion of her own counsel. The order of the twenty-eighth of February, dismissing the minor's claim for alimony, was not entered on the minutes through clerical error, and in May following, on motion of defendant contradictorily with plaintiff, said judgment against the minor was entered *nunc pro tunc*.

The court *a qua* had the power to make this correction of the minutes, and to cause the judgment to be properly entered as was done. It follows that the plea of *res judicata* must be sustained.

Mary Hardy, for the use of her child v. John E. Stevenson, 236.

3. In May, 1872, plaintiff instituted a suit against the parish of Ascension to compel the president of the police jury and the treasurer of the parish to satisfy his claim for damages in consequence of the destruction of his boat by a mob. The suit was based upon resolutions of the police jury passed in 1871, authorizing the set-

RES JUDICATA—Continued.

tlement of said claim by giving to plaintiff the bonds of the parish for \$7585, but which resolutions were subsequently repealed. There was judgment against plaintiff who appealed. This appeal, however, was subsequently abandoned.

In May, 1873, the present suit was instituted. The demand is to enforce what the plaintiff calls a compromise offered by the parish in the resolutions of 1871, before mentioned. The defense is the plea of *res judicata*.

The only difference between the suit before the court and the one decided in May, 1872, is that the plaintiff now asks for a judgment for \$7585 in *dollars*, whereas before he asked for the *bonds* of the parish for that amount. The plea of *res judicata* must prevail.

It matters not in what form the question may have been presented, if the same question once judicially decided between the same parties be again agitated, it must be regarded as the thing adjudged.

It is certain that, had the plaintiff succeeded in the former suit, he could not have instituted the present one.

Another test is that the same evidence will support both actions.

There is no force in the objection that this court can not pass upon the exception of *res judicata*, because the court *a quo* did not. By agreement the exception was referred to the merits, and the judge *a quo*, being of opinion that the defendant was entitled to a judgment on the merits, expressed no opinion as to the exception. But the whole case is before this court as it was before him. The court, therefore, is not precluded from deciding this question.

Thomas Brady v. Parish of Ascension, 320.

4. In 1867, in opposition to an application of the natural tutrix of Philomena Sarniquet for a sale of property belonging to the succession of Jean Marie Sarniquet, father of said Philomena, Joseph Sarniquet set up, without success, his title as sole legal heir of his deceased brother, said Jean Marie Sarniquet. The issue is therefore *res judicata*. He can not now revive the question by bringing suit and alleging that Philomena Sarniquet is not the legitimate daughter of Jean Marie Sarniquet and not entitled to his property. The prescription of ten years is also pleaded correctly. Philomena Sarniquet, now of age, but an idiot, has, through her tutrix, been in possession of the property as heir for twenty years. Hence the prescription of ten years is a complete bar to the action.

Succession of Jean Marie Sarniquet and Interdiction of Philomena Sarniquet—Consolidated, 419.

SEE EVIDENCE, No. 5—*Bonella & Caballero et als. v. Charles Maduel*, 112.

SEIZURES AND SALES.

1. Where the ground for injunction was that the advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure:

Held—That when a plantation and its fixtures are to be sold under a mortgage as in this case, the sale must be made at the seat of justice unless the debtor require that it be made on the plantation. The advertisement, in this case, describes the articles, called movables by plaintiff, as constituting a part of the buildings and improvements on the plantation, and with one or two trifling exceptions, they are what the law subjects to the mortgage existing on the plantation; but, if they were movables, it would not be a ground for enjoining the sale of the property subject to the mortgage, and besides, the plaintiff has not requested the sale to be made on the plantation. *A. W. Walker v. E. Villavaso*, 42.

2. An error in the calculation of interest on the judgment rendered and sought to be executed, is no ground for an injunction. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *feri facias* be issued for too large a sum. *Ibid.*
3. The affidavit on which the writ of provisional seizure issued in this case is insufficient. It was made by a person not shown to be one of the parties, or their attorneys, or a party to the suit.

The affidavit authorized and prescribed by the law is one made by the party or his attorney. One made by any other person is not authorized by the law, and, as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

S. Fernandez & Co. v. Elias Miller, 120.

4. Some personal property of Weiss, attached at the suit of Joseph Hoy & Co., was ordered to be sold as perishable property pending the attachment suit and bonds were taken by the sheriff for the price thereof.

The bonds, therefore, simply represented the property attached or the proceeds of the sale thereof and they belonged to Weiss, not to the sheriff, who was a mere stakeholder. There existed no reason why the sheriff could not seize them at the suit of another creditor, as the property of Weiss, subject of course to the prior attachment.

The suspensive appeal taken by Joseph Hoy & Co., from the judgment dissolving their attachment could not prevent Eaton & Barstow from seizing the property attached.

Joseph Hoy & Co. v. Eaton & Barstow and Sheriff, 169.

SEIZURES AND SALES—Continued.

5. The judgment of the district court dissolving the attachment of Joseph Hoy & Co., having been affirmed on appeal, said attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure, and the proceeding by garnishment on the part of Joseph Hoy & Co. against the sheriff after said seizure, did not affect it, or the rights of Eaton & Barstow under it—being *res inter alios acta*.

The right to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. had no right to do so. *Ibid.*

6. On the thirtieth of April, 1870, the plaintiffs sold to the defendants the undivided half of a tract of land situated in the parish of Plaquemines, for a certain amount cash and the remainder in three joint promissory notes, due in one, two and three years, and secured by mortgage on the property sold. On the fifth of August, 1871, said property, at the suit of Chaffraix & Agar, was sold and adjudicated to pay the first of said promissory notes. On the second of September, 1872, the said Chaffraix & Agar obtained another order of seizure and sale predicated upon the same mortgage and one of the notes—the second installment of the mortgage debt—to sell the same property previously seized and sold under the first order of seizure and sale.

Packard, one of the purchasers, in 1870, by contract with the plaintiffs, and subsequently under the sheriff's sale, in 1871, of a portion of the mortgaged property which had been divided into lots, has arrested by injunction the sale ordered in 1872, on the following grounds: That the said property was sold and adjudicated on the fifth of August, 1871, in the undivided half of fifteen lots, by an order in the case of the plaintiffs, Chaffraix & Agar, against the same defendants, to satisfy the mortgagees' rights upon said lands *in toto*; that a sufficient amount of cash was required for the matured note and costs; that the balance of the lots were sold upon terms of payments to meet the *unmatured notes*; that the land of said plantation was now owned in separate lots by the persons to whom they were adjudicated at said sale; that by said sale all the mortgages and privileges followed the proceeds, and that the whole of said undivided half so sold was relieved therefrom; that said plantation was no longer the joint property of these defendants; that plaintiffs' rights sought to be enforced are extinguished; that this defendant having purchased and paid for certain distinct lots, is now the owner of the same, unincumbered, and the seizure and attempted sale of the alleged half of said tract

SEIZURES AND SALES—Continued.

is an unwarranted usurpation of his rights and will work him an irreparable injury.

These allegations do not warrant an injunction. They are inconsistent, and the legal deductions drawn from them are incorrect. The plaintiff in injunction first states that the sale on the fifth of August, 1871, was made for cash to pay the matured note, and avers that the balance of the lots were sold on credit to meet the notes not due, and yet he alleges that the sale extinguished the debt and mortgage upon the whole tract, and that he bought certain of the lots and paid for them in full, wherefore he claims to be the sole owner thereof with an unincumbered title and has the right to arrest the sale of the undivided half, although the other purchasers do not complain. The order of sale described by him and annexed to his petition did not authorize the sale of certain of the lots for all cash, and the balance of the lots all on credit, and such sale by the sheriff would be simply null. In the opinion of this court, defendant's allegations in this case, taken altogether and as true, do not show a sale that in the least affects plaintiffs' right to enforce the mortgage by which their notes are secured.

If the defendant Packard, bought two lots or the whole of the undivided half of the plantation, under the order of court and executory process on which he relies, he only acquired thereby the rights of himself and his co-debtors, and they had no rights under the law and their contract, which could impair the plaintiffs' right to have their unmatured notes paid according to their original contract for their payment.

Chaffraix & Agar v. Christopher C. Packard et als., 172.

7. Where the debtor and owner becomes the purchaser, the sale does not extinguish the debt and mortgage not actually paid by the proceeds of the sale—the debtor being bound by his contract and not being able to extinguish his debt except by payment according to his stipulations.

If Packard had bought the whole plantation and paid the debt then due, he and the land would have remained bound for the portion not due, and the holders of the notes representing such portion could proceed to enforce the payment thereof. The sheriff could have canceled the mortgage only to the extent of the debt actually paid. Packard can not be put in any better condition by being the purchaser of only a portion of the mortgaged property and paying, as he contends, the whole of his bid, which was more than his share of the debt as one of the three co-obligors.

A sale of mortgaged property for cash to pay the instalment due and on a credit to meet those not due, does not extinguish the mortgage as to the latter.

SEIZURES AND SALES—Continued.

If, under the circumstances of the purchase, the defendant Packard has to pay more than his virile share, as he seems to fear, he may have recourse upon his co-obligors. *Ibid.*

8. To the demand of Dunbar individually against Johnson on promissory note given for mules, which the former sold to the latter, the defense is the plea of eviction. Johnson acquiring the mules from Dunbar individually permitted them to be sold, without resistance, for a certain tax due by the succession of one Crouch, of which Dunbar was administrator, and repurchased the same at that sale. That this change of title in his hands amounted to an eviction constituting a valid defense to the payment of the note he gave Dunbar individually for the price of the mules, is hardly worthy of consideration.

Where in regard to a price of land belonging to the succession of Crouch, bought by Johnson at a sale by the revenue tax collector of the United States, it was contended that the administrator of said succession could not disregard Johnson's title and attack it collaterally by proceeding to sell the said land under order of the probate court;

Held—That the pretended sale consisted in a mere notarial conveyance, without an offering and an adjudication, made twenty-five miles from the place where the distraining was effected; that such a conveyance was an absolute nullity, and that the administrator of the succession was not bound to bring a direct action to have the nullity thereof pronounced.

W. J. S. Johnson v. J. C. Dunbar, Administrator. J. C. Dunbar v. W. J. S. Johnson. (Consolidated), 188.

9. The bill of exceptions to the ruling of the court *a qua*, admitting proof to show the fact that there was no adjudication of the property to Johnson by the tax collector, was not well taken. There was actually no sale, and the administrator was not bound to tender to Johnson the price of the pretended sale.

Besides, the next year after the acquisition of his pretended title, Johnson rented the land in controversy from the administrator of the succession—thereby, in effect, conceding his want of title and acknowledging that of his adversary. *Ibid.*

10. A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing seized; second, when he contends that he has a privilege on the proceeds.

In this instance it is not contended that the minors on whose behalf an intervention is made, own the property seized; and if they had a privilege on its proceeds, about which this court says nothing, it could only be enforced when the sale had been effected. It has

SEIZURES AND SALES—Continued.

not been shown that there is any law authorizing a judge to order, as he did, the sheriff to make no title to property to be sold under execution unless it bring the price fixed upon by him.

Desiree Hickman v. Amos B. Thompson, 260.

11. Plaintiff, alleging to be the heir of one Mrs. Brady, sues to be recognized as the owner of one-half of a certain lot of ground, and for the payment of the rent thereof at the rate of fifty dollars per month from the first of February, 1867—which lot of ground belonged to the community existing between the deceased and her husband. After the death of Mrs. Brady the property, which was incumbered with a mortgage, was sold under executory process and bought by the defendant at the sheriff's sale thereof. This defense is valid. *Mary Ann Riley v. Mr. and Mrs. Condran*, 294.

12. The defendant appeals from a judgment annulling an act of sale to him of plaintiffs' property under the enforcement of a judgment. There is no evidence in the record that the property was seized by the constable who effected the sale, nor that there was a sufficient advertisement. It is proved positively that the appraiser in behalf of Gallagher and wife was appointed by a justice of the peace. A justice of the peace has no authority to appoint an appraiser in behalf of the defendant in execution at a forced sale.

An appraisement made by parties unauthorized to act is no appraisement. The property of the plaintiffs was therefore sold without appraisement, and the sale was invalid.

The objection that the plaintiffs have not returned nor offered to return the price of adjudication, and therefore ought not to succeed in their suit, has no force. The plaintiffs have received nothing to return, the defendant having purchased under his own execution. If he paid to the constable the balance of his bid in excess of the amount of the writ, that sum is yet in the hands of said constable. The plaintiffs, finding that their property had been illegally seized, refused to ratify the sale by claiming the balance of the funds in excess of the amount of defendant's writ.

Patrick Gallagher and Wife v. B. Abadie, 343.

13. The proceedings in this case appear to have been irregular. The plaintiff founds his right upon the provisions of article 3268 of the Civil Code, and yet he has failed to comply with its provisions. No separate appraisement was made of the lot of ground and the building he claims a privilege upon. The building was sold separately and without any reference to the ground it stood upon; in other terms, as if there were no connection whatever between them and no rights against both existing in other persons. Under this state of facts the sale of the house was a nullity.

Frederick Wang v. Spencer Field, 349.

SEIZURES AND SALES—Continued.

14. The proceeding sought to be enjoined in this case was predicated on the mortgage note of Joseph O'Hara, deceased, and in order to make a valid sale of the mortgaged property, the legal representative of his succession should have been made a party to said proceeding.

Notices served upon the plaintiff before she was confirmed as natural tutrix, and as such administering said succession, were not sufficient. The proceeding taken against her before her appointment, was in no sense a proceeding had contradictorily with the succession of O'Hara, the mortgage debtor.

This court cannot assent to the proposition set up in defense, that the notices were sufficient, because subsequently to the mortgage, O'Hara donated the mortgaged property to the plaintiff, his wife, and that the succession of O'Hara, having no interest in the mortgaged property, was not a necessary party.

The proceeding was on the mortgage note of O'Hara, and therefore the legal representative of his succession was a necessary party to any suit or other proceeding on that note.

Besides, if it were true that the property passed into third hands subsequently to the mortgage, no proceeding by executory process could be had, because in the act of mortgage there was not the *non alienando* clause.

The plaintiff, however, can not disavow her judicial averment that the mortgaged property belongs to the succession of her deceased husband.

Mrs. A. G. O'Hara, Natural Tutrix, v. J. N. Folwell, 370.

15. In the order of seizure and sale appealed from, the court *quarred* in granting five per cent. for attorney's fees, as the amount of attorney's fees was not fixed in the act of mortgage. The right of plaintiff to sue for attorney's fees hereafter is reserved to him.

Julius Socha v. Mrs. Louisa Renaldo, 500.

16. In the order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property, there are two fatal defects:

First—The mortgageor is not made a party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action.

Octave Reggio, Curator v. Blanchin & Giraud, 532.

17. When the district court had before it sufficient authentic evidence to justify an order of seizure and sale, if there were irregularities in the advertisement of the property, they are not to be corrected in an appeal from said order.

Mrs. Emilie Hoa v. Mrs. Mary Claney, 537.

SEIZURES AND SALES—Continued.

18. The Ingleside plantation was seized and sold in the suit of Pargoud v. Mrs. Richardson. Pargoud became the purchaser. The seizure was not released, neither did Mrs. Richardson leave the plantation which is situated within a short distance of the residence of the sheriff and Pargoud. She cultivated the land and made thereon a crop of cotton and corn with her own means, except three hundred dollars, which the sheriff paid to the hands, and which were returned to him. After she had removed some of the cotton, she was enjoined from taking anything more off the place.

The injunction was properly dissolved. It is impossible, under the circumstances, for Pargoud and Dinkgrave not to have known that she was cultivating the plantation. There is neither law nor justice in depriving her of what she made.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 632.

19. Older & Chandler, the defendants in this case, were not the owners of the property attached. The document relied upon to establish their ownership is not an unconditional sale. It was a mere agreement that whenever they should pay a certain amount of money, the property should be transferred. In the meanwhile the property belonged to Barnum & Co., and was hired by them to Older & Chandler, and was not liable to be seized to pay the debts of the latter.

Frank Stevens v. Older & Chandler—P. T. Barnum & Co., Interveners, 634.

20. This is a suit by plaintiff, individually and as administrator, to annul a certain order and judgment and the sale of certain lands made by the sheriff to the defendant in fraud, as alleged, of the creditors of the succession of which he is the administrator.

The sheriff in his return states that the sale, the validity of which is contested, was advertised by posting at the door of the courthouse, and two other public places in the parish, there being no newspaper in the parish selected according to section 15, act No. 8, approved July 24, 1868, to perform, print and publish parochial and judicial advertising. It is only after the official journal is selected and notice thereof given to the sheriff, that his advertisements are null if not published in such journal. No such selection and notice are proven in this case; hence the presumption must be in favor of the officer.

The sale was made on a mortgage created before the provision of the constitution in regard to dividing lands into small lots was put in operation, and therefore can not be affected by it.

The record does not show that the price was less than the first or previous mortgage. But it appears that the only mortgage of an

SEIZURES AND SALES—Continued.

older date than the ones on which the order of seizure and sale issued, was actually owned by the purchaser, plaintiff in the proceedings.

The judge *a quo* did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

The subject of a violation of an alleged agreement not to sell the property, but to cultivate the lands, has already been settled by this court as not being a legal ground for not causing the property to be sold, and *a fortiori*, is not a good ground to annul the sale.

E. D. Duckworth, Individually and as Administrator v. Isaac B. Payne et al., 683.

21. Where the order directs the mortgaged property to be sold according to law, and the writ of seizure has no reference whatever to a certain sum of \$49 80, as insurance premium, the plaintiff must be presumed to have abandoned the claim first set up for it.

Widow George L'Hote v. Andre Dubuch and Widow Dubuch, Administratrix, 717.

22. The plaintiff shows a just title to the property which he claims, and which was not divested by the pretended sale to the defendant, under a personal judgment of the City of Jefferson, now a part of New Orleans, *v. J. J. Scharge*. The plaintiff was neither a party to the suit nor the sale, and the writ was not directed against him. Besides, the sale was made after the return day of the writ had expired, and the constable failed to return it and retain a copy as required by law.

George Jacobshagen v. John Moylan, 735.

23. Execution having issued on a judgment obtained by R. A. Hunter in a former suit against Richardson, the plaintiff in this case, a tract of land belonging to said Richardson was sold, and Benjamin K. Hunter, the principal defendant in the present suit, became the purchaser. On a devolutive appeal taken by Richardson, the judgment thus obtained against him was annulled by this court on the ground that the citation was null, having issued in the parish of Rapides and been served upon Richardson in the parish of Sabine, the parish in which he resided and had his domicile. This action is brought by Richardson against said purchaser of the land at sheriff's sale in the suit of Robert A. Hunter against Richardson.

In so far as Benjamin K. Hunter is concerned, the proceedings in the case of Robert A. Hunter *v. Richardson* are regular. There was a petition, citation, answer and judgment. Notice of seizure was given and notice to appoint appraisers, and an appointment of an appraiser by the defendant followed by a sale. Under these cir-

SEIZURES AND SALES—Continued.

cumstances the sale, as to third persons, transferred the title to the property sold. The plaintiff's recourse, if he have any, is against Robert A. Hunter.

Thomas A. J. Richardson v. Levin P. Smith et als.—R. A. Hunter, Warrantor, 746.

SEE INJUNCTION, No. 4—*A. Whitney & G. W. Whitney v. B. Saylor, 40.*

SEE INJUNCTION, No. 12—*Augustin v. Dours et als., 261.*

SEE PAYMENT, No. 1—*Snodgrass v. Adams, 235.*

SEE MORTGAGE, No. 9—*Guilbeau v. Wilts, 600.*

SEE MORTGAGE, No. 4—*Fleitas v. Consolidated Association of the Planters of Louisiana, 223.*

SEE COMMUNITY, No. 3—*Ricker v. Widow and Heirs of Pearson, 391.*

SEQUESTRATION.

1. The motion to dissolve the sequestration should have been made absolute. The requisite oath was not made. The affiant did not state that he feared or believed that the property on which the privilege exists would be removed out of the jurisdiction of the court, or concealed, parted with or disposed of pending this suit.

Blanc & Legendre v. Wallace & Choppin et als., 492.

SEE LEASE, No. 6—*Silliman v. Short & Martin et al., 512.*

SEE JURISDICTION, No. 12—*Bradley & Co. v. Woodruff et al., 299.*

SEE BONDS, No. 10—*Daly v. Duffy et al., 468.*

STAMPS.

SEE BILLS AND PROMISSORY NOTES, No. 18—*Pargoud v. Mrs. Richardson, 672.*

SHERIFF.

1. Potthoff & Knight instituted a suit against Hill, the drawer of a note, obtained judgment, issued execution, and on the judgment not being satisfied, sued O'Hara the indorser, who, after judgment against him, paid the amount thereof. The present suit is brought by O'Hara against the sheriff and his sureties to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission amounting to malfeasance and nonfeasance in office.

The error in this case lies in the assumption that there was any subrogation in the judgment of Potthoff & Knight against O'Hara, to any right which Potthoff & Knight had against Schwab and his sureties by reason of any neglect, if neglect there was, in executing the *feri facias* which had been placed in his hands. The

SHERIFF—Continued.

sheriff may have been responsible to them, but he was not responsible to O'Hara, who was no party to the suit from which execution issued.

Therefore the conduct of the sheriff in the case of *Potthoff & Knight v. Hill* can not give rise to any action against him and his sureties in the case of *Potthoff & Knight* against O'Hara.

C. J. O'Hara v. N. Schwab et al., 78.

2. After sequestration, a certain quantity of sugar and molasses was, by agreement of the parties, shipped by the sheriff to the firm of Da Silva & Weysham, the proceeds to be held by the sheriff subject to the decision of the court.

By this agreement the parties made the sheriff their agent, and as he was not therein acting in his official capacity, his sureties are not liable for his failure to pay over the money. But he is personally liable, as it is shown that he has several times promised to pay the plaintiff the sum claimed, and there being an obligation on which the promise is based, and the evidence being received without objection.

E. J. Gay & Co. v. J. B. Lejeune, Jr., et als., 250.

3. An incoming sheriff has not the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs and for which the outgoing sheriff and sureties are liable on his official bond.

It will hardly be held that when a sheriff becomes *functus officio* he can execute writs and process of courts in his possession remaining unexecuted. His mission is completed and his authority to actively enforce the laws is at an end. But there is no impropriety or unfitness in his paying over moneys which he has in hand to the party legally entitled to receive it. He is responsible for it and not the incoming sheriff, and the right of the latter is unwarranted by law.

O. S. Sauvinet v. Thomas S. Maxwell, 280.

4. It is evident that judgment in damages against the civil sheriff for effecting the sale complained of, is erroneous, as he was acting only under the direction of a court of competent jurisdiction and carrying out its orders.

The sheriff seems to have been informed that a suit in interdiction had been instituted against the owner of the property seized, but that was no warrant for him to stop the sale. It did not follow that interdiction would result from the suit. If the parties in interest had desired to stop the sale, they should have enjoined it.

Joseph Rau, Curator of Henrietta Hooker, v. Moses Katz, et als.,

463.

SHERIFF—Continued.

5. The sheriff of a different parish from the one in which the suit is instituted is not required by law to serve civil process in his own parish, which has emanated from the parish where the suit was instituted, without being paid in advance the fees established by law for such service.

Section 7 of the act of 1870, p. 165 (Ray's Revised Statutes, p. 369, section 17,) applies only to the sheriff and clerks of the parishes in which the suits are instituted.

In this case it is not found in the record that the defendant, sheriff of the parish of Ouchita, was informed of the near approach of the period which was to extinguish plaintiff's claim by prescription, nor that the plaintiff used that degree of diligence which would naturally be expected from men of prudence and caution to avoid a heavy loss.

Without leaving out of view the important fact that public officers should be held strictly responsible for injuries or loss that may arise from a refusal or culpable neglect to perform their duties, this court must advert to the want of right in litigants to require their services without reasonable assurance of the payment of the fees allowed them by law, and without subjecting them to delay or inconvenience in receiving the same.

N. B. Adams v. B. H. Dinkgrave, et als., 626.

6. The defendant, ex-sheriff, having turned over all the papers, writs, etc., of his office, including the receipts of the keepers of the property attached, to his successor, without objection, while the attachment writs were pending and long before this and the other plaintiffs had obtained judgment, and the incoming sheriff having accepted the keepers of said property and made them his own, the defendant (out-going sheriff) is, under such circumstances, released from responsibility for its safe keeping.

John N. Coleman v. John J. Hope, 629.

SEE SEIZURES AND SALES, No. 20—*Duckworth v. Payne, et al.*, 683.

SEE ATTACHMENT, No. 3—*Chaffe, Shea & Love v. Abercrombie*, 685.

SEE ATTACHMENT, No 4—*Scott v. Davis*, 688.

SEE SUBROGATION, No. 2—*D. Durac v. Widow Ferrari et al.*, 114.

SEE PRESCRIPTION, No. 1—*State of Louisiana v. Ranson, Tax Collector*, 125.

SEE INTERVENTION, No. 4—*Hickman v. Thompson*, 260.

SEE BONDS, No. 14—*Levin et als. v. Lacey et als.*, 270.

SEE SUBROGATION, Nos. 3, 4—*Dockham, wife, v. City of New Orleans*, 302.

SEE DAMAGES, No. 4—*Cohen & Wilson v. Avery et als.*, 359.

SUBROGATION.

1. Potthoff & Knight instituted a suit against Hill, the drawer of a note, obtained judgment, issued execution, and on the judgment not being satisfied, sued O'Hara the indorser, who, after judgment against him, paid the amount thereof. The present suit is brought by O'Hara against the sheriff and his sureties to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission amounting to malfeasance and nonfeasance in office.

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Therefore the conduct of the sheriff in the case of Potthoff & Knight v. Hill can not give rise to any action against him and his sureties in the case of Potthoff & Knight against O'Hara.

C. J. O'Hara v. N. Schwab et al, 78.

2. The subrogation relied on in this case by Goulard, the third opponent was not effected in conformity with article 2160, R. C. C. This article is very explicit. The act of borrowing and the receipt must be executed in the presence of a notary and two witnesses. In this instance the receipt was given by the sheriff, and should have been rejected on the objection made by plaintiff. It is not an authentic act by law, and is not in the form of receipt required by the above mentioned article of the Civil Code. The subrogation therefore attempted in favor of Goulard, the third opponent, is without legal effect against any one having adverse claims such as the plaintiff or his transferee has shown himself to possess.

D. Durac, Jean Bazus, transferee v. Widow J. B. Ferrari, Louis Goulard, third opponent, 114.

3. In September, 1872, Potter, subrogee of the judgment styled Josephine Lacoste v. Mary Ann Nugent, who is represented as being no other person than Mary Ann Dockham, issued execution and seized under garnishment process the judgment of the plaintiff, Mary Ann Dockham v. The City of New Orleans. Before the garnishment proceeding was tried, to wit, in November, 1873, Mrs. Jane O'Rourke, subrogated to the judgment of the plaintiff against the city, filed a rule for the parties in interest to show cause why the amount of said judgment should not be paid to her.

SUBROGATION—Continued.

It is evident that Potter has a right to the judgment in controversy, which is superior to that of the plaintiff in rule, because the seizure under garnishment proceeding was made before the city was notified of the transfer of the judgment to Mrs. O'Rourke, plaintiff in rule. Until this notice was given to the judgment debtor the transferee was not possessed of the judgment, so far as Potter, a third person, was concerned.

Mary A. Dockham, Wife, etc., v. City of New Orleans. Jotham Potter, Subrogee, 302.

4. To the objection that the judgment in the case of Josephine Lacoste v. Mary Ann Nugent was a nullity, because the agent who confessed judgment was unauthorized to do so, the answer is, that the judgment was consented to by an attorney at law in behalf of Mary Ann Nugent, and his authority was not denied under oath.

It is further objected that the seizure lapsed because the sheriff detained in his hands beyond the seventy days the *feri facias* upon which the garnishment process issued. This court finds that the writ was returned and a copy issued by the clerk upon which the seizure continued, in strict compliance with the law. Besides, an irregularity of this kind on the part of the sheriff would not release the seizure nor destroy the lien acquired thereby. *Ibid.*

SEE INSURANCE No. 12—*Carroll & Co. v. New Orleans Jackson and Great Northern Rail Road Company, 447.*

SUCCESSION.

1. The acceptance of a succession is express, when in an authentic or private instrument, or in some judicial proceeding, the purpose of the heir is declared in terms so clear and distinct that no doubt can exist of his intention to accept under the responsibilities that result from an acceptance pure and simple. To incur the liability arising from an acceptance pure and simple, something more than styling himself heir in some written act, authentic or judicial, must appear in the instrument, in order to bind the party absolutely to pay all the debts of the succession out of his own means. Both in the express and tacit acceptance it must be made clear, that it was the intention of the party assuming the quality of heir to abide the disadvantages, if any should arise, of accepting simply and purely, as well as to enjoy the benefits that might accrue from it. In the one case, the intention is to be found in a fair interpretation of the terms and expressions of written instruments; in the other, it is to be inferred from acts, the motives of which can not be ascribed to any other purpose.

The subject matter of the written acts in which, by styling herself heir, it is contended in this case that the defendant became bound

SUCCESSION—Continued.

for the debts of the succession, presents collateral issues not involving the question of heirship, and in no manner relating to the acceptance of the succession.

The term *heir* has several significations. Sometimes it refers to one who has formally accepted a succession, and taken possession thereof; sometimes to one who is called to succeed, but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. Hence, the use of the word *heir* in itself is of but little moment. It is the *object* and *intent* manifested by its use that is the material thing.

Robinson Mumford v. Mrs. S. T. Bowman and Husband, 413.

2. This suit is instituted by the under tutor of the minor Kohn, to recover from S. Herman and L. Levy, the amount coming to them as heirs of their father in the property belonging to the partnership which had existed between their father and said Herman and Levy.

It is apparent from the record that the minors' interest in the succession of their father had not been handed over to their tutrix at the time she entered into another partnership with the surviving partners of her deceased husband. It was this interest, added to her rights as widow in community, which formed her share of the partnership stock. The contract was, in fact, a contract of partnership between herself, her minor children and the surviving partners of her husband. The law does not authorize such a partnership. It was an investment of her minor children's funds in an enterprise for which she had no warrant. Up to this point, therefore, the minors' property must be considered to have remained in the hands of the surviving partners.

But this court does not see where the under tutor finds any authority for attacking the defendants. If any cause of action exists against the defendants, the tutrix of the minors is the proper person to assert it.

The under tutor acts for the minor whenever the interest of the minor is in opposition to the interest of the tutor. Perhaps, in case of collusion between the debtor of a minor and his tutor, the under tutor might be authorized to interfere. But in this case no collusion is asserted. The rights of the minors have not been invaded by the defendants. Whatever transactions they may have had in which the minors' interests were involved, they had them with their tutrix, who was the only person having authority with whom they could contract. If they acted fraudulently toward the tutrix, fraud vitiates any contract, and the tutrix has her action to set it aside. If the tutrix has acted in bad faith towards her wards, the under tutor has his action against her.

Simon Netter, Under Tutor, v. S. Herman and L. Levy, 458.

SUCCESSION—Continued.

3. The plaintiff sold her interest in her father's succession to her co-legatee and consequently co-owner, who is the defendant in this case, and in the enjoyment of that interest it is not pretended that said defendant has been disturbed. It matters not whether that interest was a third or a half. The purchaser has received all that she purchased, to wit: the interest, whatever it is, and she must pay the price she has agreed to. It can not be seen under what error of law, as alleged, the defendant could have been, when making the purchase.

The plea of want of consideration is not well founded. The plaintiff did not sell any slave, but only whatever interest she might have in her father's estate. Besides, in 1867, the date of the defendant's purchase, there were no slaves to buy or to sell.

After the plaintiff sold all her interest in the succession of her father to the defendant, she had nothing to do with whatever debts of the succession the defendant chose, or was compelled to pay. There was no error in the judgment which passed over in silence the defendant's reconventional demand. To give judgment in favor of the plaintiff for the amount claimed, was practically to dismiss the reconventional demand—which dismissal the evidence justifies.

Margaret S. Pool v. Annie Alexander and Husband, 669.

SEE WIDOW, No. 1—*Cornelio McCoy and Husband v. McCoy, Administrator*, 686.

SEE PRACTICE, No. 8—*Minor v. Baker, Auctioneers et als.*, 160.

SEE HUSBAND AND WIFE, No. 2—*Anne Ford v. Anne Kittridge*, 190.

SEE ADMINISTRATOR, Nos. 6, 7, 8, 9—*Cushing et als. v. Herman-son et als.*, 214.

SEE ADMINISTRATOR, No. 10—*Succession of A. Decuir*, 222.

SEE ADMINISTRATOR, No. 11—*Louis Drouet v. Succession of L. F. Drouet*, 323.

SEE ADMINISTRATION, No. 19—*Rentz et als. v. Cole*, 623.

SEE JURISDICTION, No. 10—*Clemens v. Comfort*, 269.

SEE JURISDICTION, No. 20—*Tessier v. Littell*, 602.

SEE MONITION, No. 1—*Julia Scott and Husband v. The World*, 285.

SEE JUDGMENT, No. 7—*Taylor v. Lauer et al.*, 307.

SURETIES.

SEE PLEADINGS, No. 11—*Kilgore v. Tippit et als.*, 624.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676. No. 13—*Harrell v. Fanders*, 691.

TAXES AND TAX COLLECTORS.

1. The taxes of the years 1867 and 1868 became due at least by the first day of December of these years ; they were assessed respectively in the same years—the taxes for 1867 in 1867—those for 1868 in 1868.

Under the revenue act, approved April 4, 1865, numbered 55, and entitled "An Act to provide for increasing the revenue of the State and raising the means to pay the interest on the State debt," the lien and privilege for taxes dated from the first Monday of July of the year for which the taxes were assessed, and continued for two years.

But the revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the continuance of the tax list to five years from the first of April of the year for which the taxes may be assessed. The last section of said act provides that it shall go into effect on the first day of January, 1869, and repeals, from and after its going into effect, all laws and parts of laws contrary to its provisions.

Dunlop & McCance v. Henry D. Minor et al—Edward C. Palmer, Third Opponent, 117.

2. It was competent for the Legislature to lengthen the term of prescription in regard to tax liens. The act of 1868 is not understood by the court as repealing the thirty-second section of the act of 1865, but only as extending the duration of the lien.

The question of prescription must, in this case, be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription, and the other portion has passed under another and a different term. According to this method, it is found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed. *Ibid.*

3. The defendant's objection is that the law under which the parish tax is levied on retail liquor dealers in the parish of East Feliciana, is violative of the one hundred and eighteenth article of the State Constitution, because the tax is not uniform, inasmuch as it is regulated by the amount of business which is done ; those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5,000, another sum, and so on. This objection is fatal.

Parish of East Feliciana ex rel. J. Oscar Howell, Tax Collector, v. John Gurth, 140.

4. Section 8 of act No. 47, of 1873, which disqualifies as a witness a delinquent taxpayer, published as such for thirty days, is unconstitutional.

This provision of the act under consideration is a regulation or rule

**TAXES AND TAX COLLECTORS—Continued.**

of evidence enacted by the Legislature. The title of the act should then give some indication of it, which it does not. No one upon reading that title would imagine that the act contained any provision upon the rules of evidence or the right to be a witness in a court of justice.

John I. Adams v. Asa Webster, 142.

5. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector, v. Charles McVea, 151.

6. The ordinance of the police jury of the parish of Concordia, which provides for the levying of a special tax to be known as a contingent tax, to be appropriated to the payment of all warrants drawn on the same for the payment of attorney's fees—any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same, is violative of the 2745th section of the Revised Statutes.

In so much as concerns the payment of attorney's contingent fees, it will be time to levy and collect a tax to pay the same when the contingency which may make them due, shall have arrived. The contingency may never happen, and there would then have been no necessity for collecting the tax.

Nathan Lorie v. Bennett Hitchcock, Tax Collector et al., 154.

7. The predecessors of the plaintiffs, who administered the offices of police jurors and parish treasurer during the years 1867, 1868, 1869, 1870, 1871 and 1872, had authority to settle with the defendant for parish taxes collected by him during those years. If they permitted him to settle without taking the oath required by law, that he had not speculated in parish funds, this fact can not invalidate the settlements, although it shows a dereliction of duty on the part of those administering the parish as a municipal corporation. These settlements are final.

P. A. Simmons, President Police Jury, and Charles Leroy, Treasurer, Parish of Natchitoches, v. D. H. Boullt, Tax Collector, 277.

8. After partial settlements made in April and May, 1873, for parish taxes collected during that year, defendant owing a certain balance thereof due up to the first of July of the same year, tendered it in parish warrants to the parish treasurer, who properly refused to receive them, because the tender was not accompanied with the oath required by law.

Failing to verify by his oath that the warrants tendered were actually

TAXES AND TAX COLLECTORS—Continued.

received by him from the taxpayers, the defendant should have tendered United States currency to the amount due by him. *Ibid.*

9. A special tax having been levied and collected to pay judgments against the parish, plaintiffs claim judgment against defendant for the full amount thereof on the ground that, as tax collector, the defendant had no authority to pay the same to the judgment creditors, it being his duty to pay over all funds collected by himself for the parish to the parish treasurer, to be disbursed by that officer according to law.

There is no doubt that this was the duty of the defendant; but as he applied the sum aforesaid to the discharge of the judgments for which said sum was assessed and collected, this court fails to perceive any injury that has resulted to the parish from this irregular proceeding. It would be inequitable for the plaintiffs to recover judgment against the defendant for said amount; for, after all, the funds received their proper destination, though the channel through which they passed was not the right one. *Ibid.*

10. The collecting of certain rates fixed upon for the lease of a stall in St. Mary's Market, is not a tax upon plaintiff's occupation, which is unequal, oppressive and in violation of the constitution. It is a rent which he pays per day for the stall he occupies, besides a certain sum on each beef, sheep, etc., which he offers for sale. The ordinance was in force when he rented the stall; it is then a contract entered into between himself and the city, the performance of which he can not injoin the city from exacting.

Louis Barthel v. City of New Orleans, 340.

11. The plaintiff, not having tendered to the defendant the sum of money conceded to have been paid by the latter for taxes on certain property which she claims to be reconveyed to her, ought not to recover judgment against him for damages arising from his refusal to make the reconveyance to which plaintiff is entitled.

The claim of the intervenors predicated on the allegation that George, the husband of the plaintiff, bought the property which is sought to be made the object of the reconveyance, with money belonging to them, and which he employed for their benefit as their agent, can not be maintained. George was not the agent of the intervenors before the war of the rebellion, and was not acting as such at the time it occurred. They could not have appointed him afterwards, during the war, because they were citizens of Pennsylvania, a loyal State.

But whether the property in question was bought or not with the money of the intervenors is immaterial. If George had stolen the money from the intervenors, they could not have become the own-

TAXES AND TAX COLLECTORS—Continued.

ers of the property acquired therewith by him. Besides, they can not establish title to immovable property by parol, and they have no written evidence in support of their pretensions.

Mrs. Elizabeth George, Widow and Tutrix v. Charles Campbell—Magee & Kneass, Interrenors, 445.

12. In this suit for the taxes of 1873, the defendant insists that the default, the introduction of proof and the judgment are irregular and void, because not taken in this particular suit, but in a general entry of, "City of New Orleans v. Samuel Boyd & Co., and sundry and other taxpayers, from No. 50,000 to 59,864 inclusive;" and that the judgment signed is not the judgment entered on the minutes.

The judgment appealed from, which has the signature of the judge, is the one which the defendant has an interest in complaining of. The next question is as to his having been legally cited.

By the act, No. 48 of 1871, § 9, a publication of the names of the delinquent taxpayers, with the amounts due by them respectively, in the official journal, is a legal citation to each. After a certain delay, "upon the production and filing of said claims or bills in the appropriate and competent court, and the production of proof of publication, judgment shall be immediately rendered in favor of said city and against the delinquent taxpayer or debtor." According to this provision of the law the taking of a default was unnecessary, and, if taken, the defendant has no right to complain of a formality which is in his favor.

City of New Orleans v. S. W. Rawlins, 470.

13. There is no sacramental form for entering judgments on the minutes of the court. The records of the court must show, however, the proceedings; and, in these tax suits, an entry showing that judgment was rendered in suits from one number to another inclusive, is a record of the fact that a judgment was allowed in each for the amount of the claim.

The record here shows that a judgment was entered and signed in the case of the city of New Orleans v. Rawlins, No. 57,679; which is a number included in those in which a judgment was entered on the minutes of the court. The law assimilates the proceedings in this class of cases to those in executory proceedings, except that the proof must be presented in court. *Ibid.*

14. From the proceedings in this case it appears that the order of the twelfth November, 1873, purporting to confirm and make final the judgment by default for taxes, was inadvertently rendered and was simply nugatory; and, being without force, it could not affect the validity of the judgment finally rendered contradictorily between the parties in December.

City of New Orleans v. Robert J. Ker, 491.

TAXES AND TAX COLLECTORS—Continued.

15. The ground that the assessors and city administrators were not legally appointed, can not be urged in this proceeding. There is a law providing for the settlement of such questions.

The objection that the parish tax, the school tax and the police tax embraced in the bill are for purposes of State institutions, and are unconstitutional, because not uniform, is without force.

The constitution does not require that every tax shall be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. The taxes now in question are local taxes, levied by the city in accordance with the statutes of the State, for the objects specified as applicable to the territorial limits of the city.

City of New Orleans v. Esther Klein, 493.

16. The defendant is sued on a tax bill on real estate, which tax bill was originally two and five-eighths per cent. but subsequently reduced to two per cent. The defense is, that the ordinance under which this suit is instituted, is in violation of two prohibitory laws, to wit: Act No. 7, 1870, limiting plaintiff's right to tax to one and three quarters per cent. and act 68 of same year fixing the limit at two per cent., wherefore, said ordinance is null and void; the two acts were approved on the same day.

It is clear that the demand being only for two per cent. is not in violation of act 68.

But it is contended by defendant that the tax of two per cent. claimed being in excess of the authority conferred by act No. 7, limiting the taxing authority to one and three-quarters, can not be collected in whole or in part, while the plaintiff contends that the act No. 68, conferred the authority to collect the two per cent. claimed.

There is no absolute conflict between the two enactments. The first in order of the two acts is the City Charter, and confers on the City Council authority to levy an annual tax for the purposes of said act which should not exceed three-quarters of one per cent., provided, it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans. At the same time, there were other special statutes making it the duty of the city to levy and collect taxes known as the metropolitan tax and park tax, which are not mentioned in the designation of the taxes which, in the aggregate, should not exceed one and three-quarters per cent.

The act No. 68 need not be considered as a repealing or amending statute, but as fixing a limit in general terms to powers already conferred. If the city charter (act No. 7) were the only statute conferring authority to levy taxes, the defense set up might be



TAXES AND TAX COLLECTORS—Continued.

good, but the "proviso" in said act implies that a higher rate might be necessary.

There are many other statutes conferring the authority and making it the duty of the city to levy certain special taxes, which, all taken together, exceed two per cent. as made out in the original bill against the defendant; but the city has remitted that excess and is now only seeking to collect the two per cent. The city can well remit the excess and demand what it has authority to impose.

City of New Orleans v. Estate of D. F. Burthe, 497.

17. Act No. 57 of 1874, can have no effect in this case, which is to collect taxes in 1872 and 1873, as laws can not have a retroactive effect under the constitution of this State.

If the act of 1874 was to interpret the acts of 1871 and 1872, as seems to be its purpose, it is unconstitutional because trenching upon the jurisdiction of the judiciary. To interpret laws is not within the powers of the General Assembly. It is not a legislative, but a judicial function.

City of New Orleans v. Louisiana Mutual Insurance Company, 499.

18. The objection that the assessment of defendant's property is excessive, is a matter that can not be examined in the present action for the amount of his State taxes.

The Auditor merely calculates the proportion that each payer must pay. The discharge of this duty in no manner involves the levying of a tax by the Auditor. It is the State which levies the tax and not the Auditor.

The building of levees in Louisiana is a public enterprise or work which concerns directly at least half of the people of the State, and indirectly the whole State. Of the propriety of constructing levees the General Assembly is the exclusive judge. They have the right to assess a tax and expend the money arising therefrom in the construction of levees, or in the erection of such public works as they may deem beneficial. No individual taxpayer has the right to resist the exercise of a discretionary power confided to the Legislature.

The law making power can certainly assess a tax to pay the capital and interest of a debt which it had at the time authority to contract.

State of Louisiana v. A. A. Maginnis, 558.

19. The objection raised in this case, that acts No. 4 and 27 of the session of 1871, under which the assessments were made, are unconstitutional and void, and that it is a violation of article 10 of the constitution of this State and article 5, section 1, of the fourteenth amendment of the constitution of the United States to

TAXES AND TAX COLLECTORS—Continued.

attempt to impose upon the whole people of the State the burden of building and protecting levees for the benefit of the owners of property in a section of the State by way of taxation on the whole State, has become *res judicata* in the case of *State ex rel. Levee Company v. Charles Clinton, Auditor*, 25 An. 401.

It is no ground to resist a tax because the State debt has reached the constitutional limitation, unless the object for which the tax is levied or the law authorizing it is unconstitutional and void.

That the Legislature has improperly diverted a trust fund, is a question that may concern the owner or owners of that fund. It is a matter in which the respondent has no interest.

This court can not presume, in the absense of proof on the subject in the record, that the New Orleans, Mobile and Chattanooga Railroad Company has failed to fulfill the conditions on which the State has issued her bonds as an indorsement for said company, and that thereby the State is released from an obligation incurred before the adoption of the constitutional amendment limiting the State debt to twenty-five millions. *Ibid.*

20. The objection to the validity of the bonds issued under act 32, approved February 25, 1870, to pay for work on the levees of the State, has no force. Said act is not in conflict with articles 110 and 118 of the constitution of the United States.

The payment by the State in the form of bonds, for work on the levees of the State, is not taking private property, or divesting vested rights in the meaning of the constitution, State or federal. The question as to whether a tax shall be levied on all the taxable property of the State, or only on the particular localities where the work is done, is a question of policy to be determined by the Legislature and not by the courts, there being no constitutional regulation on the subject.

Whether the original proprietors were bound or not to keep up the levees, does not affect the power or right of the State to do so, and, in this proceeding, the court can not pass on the question of consideration if it be a matter for judicial inquiry.

Whether these were the necessary parties to institute a suit or not in this instance before the intervention of Sheridan, the holder of some of the bonds in question, it is quite sure that, after he intervened, to the extent of his interest in the bonds, there was a plaintiff in injunction, the State; and a defendant, Sheridan; and there was thus a joinder of issue.

The act No. 32, called in question, was approved on the twenty-fifth of February, 1870, about two months before the adoption of the constitutional amendment referred to. It is impossible therefore to imagine how that law can be affected by said amendment.

State of Louisiana v. Charles Clinton, Auditor, and A. Dubuclet, Treasurer. G. A. Sheridan, intervenor, 561.

TAXES AND TAX COLLECTORS—Continued.

21. The construction of levees can not be called a *local* work in Louisiana, but even should such a work be local in its character, there is no prohibition against the General Assembly authorizing local improvements to be made and providing for the payment thereof.

Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes and what does constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which can not be controlled by the courts, except perhaps when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.

If the theory of the plaintiff be correct, that the appropriations for levees and railroads are for private purposes and not legitimately the subjects for legislation, and therefore, that the debts created for such purposes are unconstitutional—a *fortiori* would bonds, issued in aid of the property banks of this State be void—and thus, all the bonded debt of the State, created during the last forty years, would be null and void. Courts, whose duty it is to deal with facts and laws, can not seriously be expected to adopt such vagaries.

No provision of the constitution has been cited, which forbade the State to contract the debt in question, and if there be none, as is believed to be the fact, the debt is valid. *Ibid.*

22. While the property seized for taxes, and the sale of which is enjoined, belonged to the former proprietor, W. J. Darden, no registry was necessary to preserve the privilege of the State for taxes due by him. But when the plaintiffs bought the property in 1872, it passed to them free of the privilege for taxes for the preceding years, because there was no registry of those tax claims. The subsequent registry could not fix on the purchasers an incumbrance which did not exist as to third persons, when the plaintiffs acquired the property.

John I. Adams & Co. v. Samuel Wakefield, Tax Collector, 592.

23. The plaintiff is a peddler or hawker, and was selling his wares in the parish of Richland. Whether he carried them in a pack, in his hand, or on a steamboat, matters nothing. However they were carried, the parish had the authority to demand the payment of a license for the sale thereof, and this without infringing upon the provisions of the constitution of the United States concerning the regulation of commerce.

Steamer Stella Block v. Parish of Richland et al., 642.

TAXES AND TAX COLLECTORS—Continued.

24. Section 25 of the charter of the city of Monroe, confers full authority on the city to assess and collect taxes and to impose penalties for non-payment of taxes. The grant of full power to tax carries with it authority to use all means necessary to accomplish the object; and the imposition of penalties after due notice for non-payment of taxes, is a legitimate means of collecting revenue. The State can confer this power because there is no limitation in the constitution inhibiting it.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution and void. The title of the charter is "An Act to incorporate the city of Monroe, to fix its boundaries, to provide for the government," etc. The statute would fail to provide for the government of the city of Monroe, if it failed to authorize the levy and collection of taxes for the support thereof.

A. L. Slack, Administrator, v. James S. Ray, Assessor and Collector, 674.

25. The assessment for revenue purposes consists in the descriptive lists and the valuation of property by the officers designated for that purpose, and if any discrepancy in the description of the property exist between the original lists and the copies furnished, the description in the original must control.

This court has no jurisdiction over the question of excessive taxation of property, after the delay given to taxpayers to correct their assessment has expired, if it ever has.

Inasmuch as the registry of the list of delinquent taxpayers was made before the recordation of the plaintiff's deed, he can not raise the question of registry, even if necessary to procure the right of preference in favor of the State.

Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic, and it is competent for the sovereign to provide how these contributions shall be collected and to say whether the right of preference shall exist for the payment of the same, and for what length of time.

The right of taxation is one of the attributes of sovereignty, and the fundamental law of the State provides that it shall be equal and uniform and *ad valorem*. It is the property of the State which is to be taxed, and it is immaterial to the State whether it belongs to A or to B. As long as the tax is unpaid, the State has a right to exact it.

It is also competent for the State to make each and every piece of

TAXES AND TAX COLLECTORS—Continued.

property owned by any one, responsible for the whole amount of the taxes assessed to him—and such is in fact the law.

Thomas R. Geren v. E. H. Gruber, Tax Collector, 694.

26. The right of redemption accorded *ex gratia* must be exercised under the conditions imposed.

The constitutional objection that the penalties are being collected without due process of law, and that they can only be collected by hypothecary action, has no force. As there is no debt and no mortgage to enforce, the hypothecary action could not be maintained. Due process of law is provided in the statute on the subject. The same statute declares that the property is burdened with the taxes and a lien and privilege to secure the payment of the taxes, and that it will remain burdened into whatever hands it may pass.

There is no force in the objection that the amount of the penalties is not mentioned in the recorded list against the delinquent taxpayer. The penalties, like legal interest, are fixed by law.

The recordation of a description of the property of a delinquent taxpayer is the *mode of seizure* provided for by the statute.

The law maker did not contemplate the advertisement of the property before the seizure. It declares that the tax collector, on the fourth day of such recordation, may proceed to sell without (other) legal process, after advertising, etc., etc. The four days must be regarded as the days of grace allowed the delinquent before advertising his property for sale—corresponding to the delay accompanying notices of seizures. *Ibid.*

27. The plaintiff's purchase of certain lots from the original owner, as whose property they were assessed, could only have invested him with such rights as the original owner and delinquent taxpayer, and that was the right of redemption.

Not having offered to avail himself of the right of redemption under the conditions prescribed, the plaintiff had no interest or right to interfere by injunction with the proceeding of the tax collector.

The law authorizing one hundred per cent. damages for wrongfully enjoining the collection of taxes, does not apply when one, other than the person to whom the taxes are assessed, sues out the injunction, and the original taxpayer can only do it prior to the forfeiture. *Ibid.*

28. The plaintiff has enjoined defendant, tax collector, from selling certain lands seized for non-payment of taxes. He contends that the collector's authority does not extend to the sale of lands forfeited to the State as his were, under sections 66, 67 and 68 of article No. 42 of the acts of 1871. The plaintiff can not assume this position

TAXES AND TAX COLLECTORS—Continued.

without putting himself out of court, because, if his lands were forfeited to the State in pursuance of said act, the only right remaining to him is the right of redemption, under section 69 of said act, and until he chooses to exercise this right, he has no more interest in said lands than any other individual.

Besides, if the defendant has no authority to sell the lands forfeited to the State, no title will pass to the purchaser; there will be no change of ownership and the plaintiff can not be injured. But, on examination of the statutes, it is found that the tax collectors have authority to collect taxes on the delinquent lists, and for this purpose can sell the land forfeited to the State.

The implied contract of every citizen with the State, is to bear his share of the common burden of taxation for the support of the government. If he should fail to meet this obligation, there is no reason why he should not pay damages for breach thereof.

The law authorizing the forfeiture of the lands to the State after due notice has been given to the owner, and reserving to him the right of redemption on paying certain damages and costs, is regarded as a legitimate means employed by the State to collect her resources.

O. H. Morrison v. P. J. Larkin, Tax collector, 699.

29. Nothing is found in the law authorizing the forfeiture of the lands to the State for non-payment of taxes after due notice, repugnant to the articles of the State constitution relied on by plaintiff, nor is it in contravention of article one of the fourteenth amendment of the Constitution of the United States.

It is true that the special grant of authority in article 118 of the constitution, to the general assembly, "to exempt from taxation property actually used for churches, school or charitable purposes," carries with it implied inhibition against the exemption of property not actually used for church, school or charitable purposes. But, while those sections of the law and the special acts exempting property from taxation in contravention of the constitution, may be void, the other provisions of the law authorizing the levying and collecting of the taxes are valid and may be enforced.

If the exemptions complained of contravene the constitution, they are void, and such property under section 55 of act 42 of the acts of 1871, is liable to be assessed and taxed like all other property.

There is then no inequality of which the plaintiff can complain.

Section 8 of act 47 of the acts of 1873, prohibiting a delinquent tax payer from bringing a suit or being a witness, is violative of article 114 of the constitution and void, the object of said section not being expressed in the letter of the law.

In regard to the one hundred per cent. damages for suing (section 3 of

TAXES AND TAX COLLECTORS—Continued.

article 47 of acts of 1873), that provision does not apply to a case like this, when lands have been forfeited to the State. *Ibid.*

30. The judgment appealed from in this case was not rendered without due process of law, as alleged. Publication of notice to the taxpayer, as provided by law, is the mode of citing delinquent taxpayers in the city of Shreveport, and that is due process. The Legislature has the power and discretion to regulate the manner of citing parties to appear before the courts of the State.

The title of the act incorporating the city of Shreveport is, "An Act to incorporate the city of Shreveport, define its limits and provide for its better police and municipal government." Taxes are necessary to "provide for the better police and municipal government" thereof, and germane to the objects indicated in the title of the law; and this satisfies the requirements of the constitution.

City of Shreveport v. J. W. Jones, 708.

31. The right of the Legislature to delegate the power of taxation for municipal purposes to a municipal corporation, and the right to allow the corporation to adopt rules for the collection of the same has already been decided affirmatively.

Prior to the day on which the sale of the property seized for tax was to take place, the delinquent taxpayer paid the tax, and enjoined the sale with regard to the penalty. The injunction improperly issued. After default the penalty was due as well as the amount of the tax and was equally exigible.

Louisa O. Bracey and Husband v. James S. Ray, Assessor and Collector, 710.

32. This is a suit for the payment of taxes and penalties. The judge *a quo* erred in including the \$2 25 allowed the collector, in the principal or amount of the taxes on which the penalties are calculated. This sum of \$2 25, composed of \$2 for the suit and 25 cents for notice, are simply costs and are not a part of the amount due the State.

In the *fieri facias* which, it seems, was prematurely issued, the clerk has incorrectly interpreted the judgment and issued execution for items not embraced in the judgment as rendered. The officers of the law, collector, clerk, sheriff and any others, can not be too careful in conforming to the exact provisions of the law in the discharge of their duties.

State of Louisiana v. The Eclipse Towboat Company, 716.

33. This suit having been brought in October, 1873, and the judgment rendered on the second October following, it was an error to allow a penalty, because until the fifteenth of December, 1873, the defendant was not a delinquent taxpayer for the year 1872.

TAXES AND TAX COLLECTORS—Continued.

That the defendant's property was not accurately described on the tax roll, is no reason why he should except to the suit, or escape the payment of his taxes to the State. The court *a quo* did not err in treating his exception as an answer and proceeding with the trial. The judge *a quo* erred when he permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

State of Louisiana v. S. W. Edgar, 726.

34. Where the proceedings in a tax suit are against a person who is not the owner of the property taxed, the sale in which they eventuated, can not affect the title of the real owner. Besides, it is seldom that more glaring irregularities and defective proceedings in other respects are ever exhibited.

Mrs. C. Desormeaux, widow of S. B. Smith v. John Moylan, 730.

35. Where there is no note of evidence in the record, this court is bound to presume that the judge *a quo* did his duty and had sufficient proof before him to justify his decree.

The complaint that the judgment is \$2 25 in excess of the allegations of the petition is not well founded. It is claimed as due the tax collector; and under section 75 of act 42 of acts of 1871, it should be recovered against the defendant.

There is error in the judgment of the court below in allowing the penalty of twenty-five per cent. from the fifteenth of December, 1871. It can only run from the fifteenth of December, 1872, because until then the defendant was not in default for the taxes of 1871.

State of Louisiana v. A. De Monasterio, 734.

SEE LOCUS PUBLICUS, No. 2—*New Orleans Sugar Shed Company v. Harris*, 378.

TRANSFER OF PROPERTY.

1. The evidence in this case shows that the transfer, the legality of which is questioned, was not a sale, but a *giving in payment*; that, at the time, the transferors were in insolvent circumstances, and that the transferees knew that fact. The transfer was evidently designed to give an unjust preference to the transferees.

The pretext that the plaintiffs were not injured by the transfer, because Homer, Rex & Tracey, the transferees, had a privilege on the property transferred, is untenable. There is no evidence in the record to establish a privilege in their favor, and there is testimony to show that they could not have had a privilege on a large portion of the property embraced in the act of transfer.

Charles De Greck & Co. v. Murphy & Gairns and Homer, Rex & Tracey, 296.

SEE LEASE, No. 2—*McCarthy v. Baze et al.*, 382.

SEE LAWS AND STATUTES, No. 12—*Taylor v. Twenty-five Bales of Cotton, Blackmore et al.*, 247.

TUTOR.

1. This is a suit to annul the judgment homologating the proceedings of a family meeting recommending, and the order appointing, defendant as the tutor of certain minors.

It was not incumbent on said defendant, in order to be appointed, to allege or show that there were no relatives of the minors in the State entitled to the tutorship.

It is the duty of the relatives residing within the parish of the judge who is to make the appointment, to apply to such judge within a given time, to have a tutor appointed when necessary. The plaintiff in this case, who alleges to be the grand mother of the minors, resides in the distant parish of Caddo, and there is no relative in the parish of the minors.

Any one may give information to the judge of the necessity for the appointment of a tutor, but it is not necessary for such person to show who are entitled to the tutorship. If there be such in the parish, they can apply for the appointment, or make opposition to any application.

The fact that the family meeting were not unanimous in recommending the defendant, may have been a ground for opposing the homologation of the proceedings, or for the convoking by the judge of another meeting, but it is not a ground for annulling the judgment of homologation or appointment.

The appointment of a tutor without bond is authorized upon the advice of a family meeting, when no one will take the tutorship and comply with the law requiring a bond. It is shown in this instance that the minors owned no property and that the defendant had charge of them for about seven years before any of their relatives claimed the tutorship.

The grand mother of the minors could, by timely proceeding, have procured the appointment to their tutorship in preference to the defendant, but the latter having been duly appointed, she can not urge such right as a ground for his removal or the annulment of his appointment.

Mary Markham v. Jacob J. Schardt, 703.

SEE ADMINISTRATOR AND EXECUTOR.

UNITED STATES COLLECTOR OF CUSTOMS.

SEE PAYMENT, No. 1—*Snodgrass v. Adams*, 235.

UNITED STATES BRANCH MINT.

SEE NEW ORLEANS, No. 5—*Coleman v. City of New Orleans*, 451.

VENDOR AND VENDEE.

SEE PRIVILEGE, No. 6—*Stevens v. Pinneo et als.*, 617.

WALL IN COMMON.

1. This suit is for the payment of a wall designated as A, for the value of a wall designated as B, and damages for closing windows or apertures in wall A. When wall A was built with windows by Blasco, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always have made the wall a wall in common by paying for the half of its costs.

Subsequently Blasco sold the lot to the plaintiff, with the windows still in existence, and plaintiff purchased from Burgunder said adjoining lot upon which the wall rested for half of its thickness. Some years after, the plaintiff sold to defendant the Burgunder lot, the windows continuing open in the wall and the deed remaining silent concerning them. This sale did not relieve the owner of the Burgundy lot from paying for the wall in common, whenever he might desire to use it.

The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell this wall, but only the lot which he had bought from Burgunder.

There can be no question of servitude in this case. The wall belonged to plaintiff in full ownership, until the owner of the contiguous lot should pay for the half of it, and this right would exist so long as that wall stood. When paid for, the owner of the contiguous lot became the joint owner of the common wall and could use it as owner. He could therefore close the windows in order to use the wall as a wall in common.

It is evidently in derogation of common right to permit a man to appropriate the land of another without paying for it. But the law provides a *quid pro quo* to the proprietor whose rights of property are thus invaded, by giving him the right always to make it a common wall by refunding one-half of the cost thereof.

Mrs. J. Lavergne, Tutrix et al., v. Mrs. Numa Lacoste, 507.

WIDOW.

1. When the amount allowed to a widow in necessitous circumstances is claimed, it must be clearly established that these circumstances existed at the time the suit was filed.

Cornelia McCoy and Husband v. Neely McCoy, Administrator, 686.

WILLS AND TESTAMENTS.

1. The language of the notary in the *proces verbal* of a will, "that the said testator, being illiterate, signs his mark," does not meet the requirements of article 1579 C. C., which prescribes that this declaration must be made by the testator himself.

WILLS AND TESTAMENTS—Continued.

In this instance, the testator has not declared that he knows not how to sign, nor has express mention of that declaration been made in the will. His testament is therefore null and void.

Succession of Caleb Whittington, 89.

2. Where it was urged, in contesting the validity of a will, that there is a distinction between domicile and residence, and the statement that the witnesses are domiciliated in this city, is not a compliance with the law which says, "witnesses residing in the place;"

Held—That this court is satisfied, that the notary used the word *domiciliated* as synonymous with *residing*, as it is, and without any consciousness of the legal distinction invoked by counsel.

In this instance an examination of the extracts of the will recited in the judgment, makes it manifest that, although said will is not artistically drawn, yet that the formalities mentioned in articles 1578, 1579 and 1580, R. C. C., are observed. There are no sacramental words prescribed by law.

Martin & Regget Rongger v. Katherine Kissinger, 338.

3. If words are used which, taken all together, show that the notary did all that the law makes essential, the will is good as to form, although the notary may be confused in his manner of expressing himself. The object of the law is to have it appear from the will itself, that the prescribed formalities have been observed. *Ibid.*
4. The statement that the witnesses were present and within hearing of the testator, all the time in which the will was written, taken in connection with the other statements, that it was written according to his dictation, (the testators), and that all was done without interruption *at one time*, must mean that the dictation, as well as the writing, was done in the presence of witnesses.

It would have been more clear and accurate if the notary had used the words: "*as dictated*" instead of "*according to his dictation*," but the latter expression, as used in this instance, means what the other does.

To adopt the construction contended for by counsel, would be refining a little more than the law does, and prescribing a fixed formula to be used by notaries, who all have their peculiar mode of expression. *Ibid.*

5. In this case it is shown that the heirs of George W. Johnson ratified and confirmed his will; that they were recognized and put in possession of their respective shares; that his succession has been fully administered; that the dispositions of the will were carried into execution as fully as it was possible, and that his executors have been discharged. After all these proceedings, and in the face

WILLS AND TESTAMENTS—Continued.

of these solemn acts, none of the heirs can now be heard, when they seek to annul the will in any of its parts.

Heirs of E. A. Johnson v. Bradish Johnson, 570.

SEE EVIDENCE, No. 7—*Boa v. Filleul*, 126.

SEE DONATIONS, No. 1, 2, 3—*Succession of Thomas Hale*, 195.

SEE JUDGMENT, No. 7—*Taylor v. Lauer et al.*, 307.

WITNESS.

1. A commission was issued to take the testimony of plaintiff, Mrs. E. LeBlanc, (Ernestine Chauveau), and her mother, then in France. This commission having been returned unexecuted, the defendant moved, *ex parte*, to take the answers for confessed, and the order was accordingly made.

This was clearly wrong. There is no law to authorize the testimony of a witness to be taken for confessed. These interrogatories on facts and articles were propounded to the plaintiff, who was then in France, but they were returned unanswered, as Mrs. LeBlanc had come back to Louisiana.

Thereupon the defendant filed a supplemental answer with interrogatories on facts and articles and asked that they be answered in open court. Objections were made to the interrogatories by the plaintiff's attorney—among others—that they were vague, impertinent and had nothing to do with the real issue in the cause.

The judge *a quo* sustained the objections, except as to the first question which was ordered to be answered. The ruling was correct. If she had failed to answer at all, she would have been protected, as the order did not fix a day on which she was to answer. But the plaintiff appeared in court and answered it.

The plaintiff having offered herself as a witness, the defendant objected to this, on the ground that her answers to interrogatories as a *witness* having been taken for confessed, she could not be permitted to testify. The judge properly overruled the objection. If the defendants really wanted her testimony, when she was upon the stand as a witness they might have obtained it, if responsive to the matters at issue.

Mrs. E. LeBlanc v. Succession of Charles Massieu, 332.

SEE WILLS AND TESTAMENTS No. 2, 3, 4—*Rongger v. Kissinger*, 338.

SEE EVIDENCE No. 4—*State v. Gaetano Rosa and Rosa Rosa*, 75.